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PROTECTING CONSTITUTIONAL FREEDOMS IN THE FACE OF TERRORISM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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PROTECTING CONSTITUTIONAL FREEDOMS IN THE FACE OF TERRORISM

WEDNESDAY, OCTOBER 3, 2001

UNITED STATES SENATE,
SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND
PROPERTY RIGHTS, COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 9:34 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, chairman of the Subcommittee, presiding.

Present: Senators Feingold, Durbin, Hatch, Specter, and Sessions.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. I will call the Subcommittee to order, and I would like to welcome all of you to this hearing of the Subcommittee on the Constitution on "Protecting Constitutional Freedoms in the Face of Terrorism." We have a very distinguished panel of witnesses here this morning and I very much appreciate your willingness to speak with us, especially on such short notice.

Almost as soon as the attacks on September 11 ended, public discussion turned to two issues: how the United States will respond to these terrorist attacks, and how we can protect ourselves against future attacks. And almost immediately, discussion of that second issue raised the question of how our efforts to prevent terrorism will affect the civil liberties enjoyed by all Americans as a part of our constitutional birthright.

I was greatly encouraged by the words of Senator George Allen, who represents one of the States struck by terrorism, on the day after the attacks. He said on that day, "We must make sure that as we learn the facts, we do not allow these attacks to succeed in tempting us in any way to diminish what makes us a great Nation. And what makes us a great Nation is that this is a country that understands that people have God-given rights and liberties. And we cannot, in our efforts to bring justice, diminish those liberties."

I agree with Senator Allen, and I believe that one of the most important duties of this Congress in responding to the terrible events of September 11 is to protect civil liberties which derive, of course, from our Constitution. Now, that is not to say that we cannot enact more measures to strengthen law enforcement. There are many things that we can do to assist the Department of Justice in its mission to catch those who helped the terrorists and prevent future attacks. We can, and we will, give the FBI new and better

tools, but we must also make sure that the new tools don't become instruments of abuse.

There is no doubt that if we lived in a police state, it would be easier to catch terrorists. If we lived in a country where the police were allowed to search your home at any time for any reason, if we lived in a country where the government is entitled to open your mail and eavesdrop on your phone conversations or intercept your e-mail communications, if we lived in a country where people could be held in jail indefinitely based on what they write or think or based on a mere suspicion that they are up to no good, the Government would probably discover and arrest more terrorists or would-be terrorists, just as it would find more lawbreakers generally.

But I think we can all agree that that wouldn't be a country in which we would want to live and it wouldn't be a country for which we could, in good conscience, ask our young people to fight and die. In short, that country wouldn't be America.

In a recent L.A. Times article, Professor Erwin Chemerinsky, a distinguished law professor at the University of Southern California, put the challenge before us squarely: "Some loss of freedom may be necessary to ensure security, but not every sacrifice of liberty is warranted. For example, people accept more thorough searches at airports even though it means a loss of privacy, but strip searches and body cavity searches would clearly be unacceptable. The central question must be what rights need to be sacrificed, under what circumstances, and for what gain."

I think it is important to remember that the Constitution was written in 1789 by men who had recently won the Revolutionary War. They did not live in comfortable and easy times of hypothetical enemies. They wrote the Constitution and the Bill of Rights to protect individual liberties in times of war as well as times of peace.

There have been periods in our Nation's history when civil liberties have taken a back seat to what appeared at the time to be the legitimate exigencies of war. Our national consciousness still bears the stain and the scars of those events: the Alien and Sedition Acts, the suspension of habeas corpus during the Civil War, the internment of Japanese Americans during World War II and the injustices perpetrated against German Americans and Italian Americans, the black-listing of supposed communist sympathizers during the McCarthy era, and the surveillance and harassment of anti-war protesters, including Dr. Martin Luther King, Jr., during the Vietnam War.

We must not allow this piece of our past to become prologue. Preserving our freedom is the reason we are now engaged in this new war on terrorism. We will lose that war without a shot being fired if we sacrifice the liberties of the American people in the belief that by doing so we will stop the terrorists.

That is why this exercise of considering the administration's proposed legislation and fine-tuning it to minimize the infringement of civil liberties is so crucial. And this is a job that only the Congress can do. We cannot simply rely on the Supreme Court to protect us from laws that sacrifice our freedoms. We took an oath to support and defend the Constitution of the United States, and I hope that

our witnesses today will assist us in our duty to be true to that oath.

Now, I would like to call on Senator Hatch, the ranking member of the full committee, after which Senator Sessions, who is going to represent the subcommittee ranking member, Senator Thurmond, today, will make brief remarks as well.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Thank you, Mr. Chairman.

We are happy to welcome all you witnesses here today. This is an important hearing and I will be very interested in what you all have to say. I can only stay for a short period, but I will read every statement and pay attention to them.

I am very pleased that the Chairman, Chairman Leahy, and I and others are working very closely with the Justice Department and with the White House to try and come up with constitutionally sound approaches here that will help protect our country. I think we are very close to agreement.

I think if we can bring this agreement about, it will be one that most everybody who is reasonable should support and will be in the best interests of the country and the best interests of the protection of our citizens, something that I have been arguing needs to have been done long before this particular time and before September 11.

Mr. Chairman, as you know, we have collectively committed to a war unlike any war in the history of this country. It is different because a substantial part of this war must be fought on our own soil, and this is not a circumstance of our own choosing. The enemy has brought this war to us, but we must not flinch from acknowledging the fact that because this is a different kind of a war, it is a war that will require different kinds of weapons and different kinds of tactics.

Mr. Chairman, let me also thank you for holding this hearing to educate the public and the committee on the importance of our constitutional rights.

The Attorney General has communicated to us and in no uncertain terms has told us that he does not currently have all of the tools necessary to fight this war. Over the last several weeks, I and several members of this committee, as I have said, have undertaken a microscopic review of the anti-terrorism proposal submitted by the administration. We have engaged in round-the-clock negotiations over the final shape of this legislation. Everyone concerned is extremely concerned about the constitutional aspects and the constitutional considerations that are essential to making this legislation what it should be.

During the course of this review, I have become quite familiar with the details of this proposal, as you can imagine. I would like to congratulate the Attorney General and the Department of Justice for moving responsibly on this matter, for working responsibly with us and taking care to request only those reforms that fit well within the bounds of the Constitution.

Although the proposal has been the subject of intense scrutiny over the last couple of weeks, a significant amount of the objections

to the proposal have been on matters of policy, not on matters of constitutional concern. As the White House and the Attorney General have recognized, by submitting such a restrained proposal, we must not repeal or impinge upon our cherished constitutional liberties. To do so would only bring us closer to the joyless society espoused by our enemy.

The administration's proposal properly takes these concerns into account, and at the same time does what people around America have been calling upon Congress to do; that is, to give our law enforcement community the tools they need to keep us safe in our homes, in our places of business, as we travel throughout our country, and as we enjoy life in this country that we have always taken for granted prior to September 11.

As a result of the substantial progress that we have made in our scrutiny and debate over the past several weeks, I do believe, as I have said before, that we are close to a consensus package that will pass this Congress, I believe, with overwhelming bipartisan support, and I think in the best interests of the American people.

The Attorney General has explicitly told us what tools he needs. I have personally reviewed his requests and found them to be consistent with our constitutional protections, especially as we fine-tune them. I hope that as we present this ultimate package—and I hope we can do it this week; I am hopeful that we can mark it up tomorrow, and I believe we can. There is no excuse in the world for not doing it, and I believe the Chairman does intend to do that, or at least that is what has been indicated to me. I think that is the responsible thing to do.

As we mark it up, I hope that the American people will see the wisdom of this, will see the importance of it, will see how we will have better tools to interdict and stop terrorist acts like we have seen, and do so in ways that are constitutionally-sound without violating constitutional principles or civil liberties.

I am just grateful to you, Mr. Chairman. I appreciate you holding this hearing, and I am grateful for the work that Senator Sessions does on this committee and on this subcommittee.

Chairman FEINGOLD. I thank you, Senator Hatch. I thank you for your statement and for all your hard work to try to come to an agreement on this, and also for complimenting us on having this hearing. The fact is that the hearing with the Attorney General was interrupted before many of us could ask questions. There has been no testimony before this committee by experts on civil liberties at this point, and we are hoping that this hearing can help us before this matter goes through and we can explore some of the items that were originally proposed, as well as some of the compromises that have been suggested.

Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. This is a worthwhile hearing and I appreciate your calling it. I thank Senator Hatch for his insight and leadership in these matters. I know there are a lot of negotiations going on, and I have interest in those and it will be interesting to see how it comes out.

I would just say that I have gotten older and have examined what goes on around the world, it strikes me that progress, liberty, wealth and health are functions of orderly governments. Governments have to maintain order or else they don't succeed.

I believe the reason we have so much poverty and so much oppression of one group by another is because government is unable to maintain order, and as a result economic growth and sophisticated science cannot flourish.

Our Constitution begins, "We the people of the United States, in order to form a perfect Union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty for ourselves and our posterity, do ordain and establish this Constitution." It provides great protections for us, and I don't believe there is anything in the administration's bill that the Supreme Court would conclude violates the Constitution of the United States.

We know that in war time we have historically done that in great degree. Chief Rehnquist once again has written a book that is very timely, *All Laws But One*, in which he talks about the diminishment of constitutional protections in war time, and delineates a host of them that we have done in this century, big-time diminutions of freedom. But I don't see that in this bill, so I would be glad to hear these experts tell me precisely what is in the legislation they think would violate current standards of constitutional thought and our great beliefs in freedom.

As Senator Hatch noted, we are dealing with people who are capable of killing us in large numbers, innocent civilians, creating disorder and economic disruption in ways that we have never seen before. So I think if we are smart, if we work at it right, we can utilize our great historical principles to give some tools that law enforcement needs that can protect us without undermining the Constitution.

Thank you, Mr. Chairman.

[The prepared statement of Senator Sessions follows.]

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Today we address whether the Adminnistration's Anti-Terrorism legislation violates the constitutional freedoms of our people during this War on Terrorism. This is an important issue, and I commend Chairman Feingold for holding this hearing.

My review of this legislation leads me to conclude that it does not violate the Constitution. Indeed, no serious commentator has established that it does. And four former Attorneys General have expressed their support for the bill, stating "We believe that the proposals are consistent with the Constitution and would not unduly interfere in the liberties we as Americans cherish. Letters from Griffin Bell, Dick Thornburgh, Edwin Meese III, and William Barr, Attorney General, to Chairman Leahy and Senator Hatch, Senate Judiciary Committee (Oct. 2, 1001).

Placed in context, this legislation is a modest and measured response to the ruthless acts of war that only a few weeks ago cost us the lives of more than 5,000 people and threatens to take many more. To frame the context for assessing the legislation's impact on our constitutional liberties, we must begin with the Constitution and its history.

THE CONSTITUTION

While it is presently fashionable to speak only in terms of "rights," the Declaration of Independence and the Constitution speak also in terms of governmental power—the power to secure these rights. The Declaration of Independence states:

> "We hold these Truths to be selfevident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights,

> that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men. . . .'' *The Declaration of Independence para. 2 (1776) (emphasis added).*

The preamble to our Constitution states:

> ''We the People of the United States, in—Order to form a more perfect Union, establish Justice, insure *domestic Tranquility*, provide for the *common defence*, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'' *U.S. Const. preamble (emphases added).*

Thus, the Framers knew that liberty would not be secure without domestic tranquility and without a strong defense against foreign enemies. If the Government does not maintain order, then the weakest and most disadvantaged in society are the first to suffer the loss of liberty and the last to recover it. As the great liberal judge Learned Hand stated, ''A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few. . . .'' *Learned Hand, The Spirit of Liberty 191 (New York: Alfred A. Knopf 1952).*

In the *FEDERALIST PAPERS*, James Madison assessed the balance between the Government's power to prevent stronger individuals from infringing on weaker individuals' rights and the Government's tendency to impinge on those rights itself as follows:

> ''In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.'' *The Federalist No.* 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

It is clear that the Framers did not want to repeat the error of the Articles of Confederation that produced a Government too weak to survive longterm internal and external threats and almost too weak to survive a war.

HISTORICAL CONTEXT

There is ample history of governments trying to win wars and curtailing civil liberties in their efforts. In his 1998 book, *All The Laws But One*, Chief Justice Rehnquist states:

''In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.'' *William H. Rehnquist, All The Laws But One 222 (1998).*

Rehnquist recounts that at different times during the Civil War, World War I, or World War II, the federal government suspended the writ of *habeas corpus*, tried civilian citizens in military commissions without a jury, interned people based on their race without individualized determinations that they were threats to national security, and suppressed anti-war speech and press articles. *William H. Rehnquist, All The Laws But One 25, 34, 174–75, 214–15 (1998).*

I would add that during the Korean War, the federal government seized privately-owned, lawful, and legitimate steel mills that were not connected with criminal activity. *See Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (holding that President Truman could not seize the nation's steel mills during the Korean War).

THE ADMINISTRATION'S BILL

Placed in context, it is clear that the constitutional effects of the Bush Administration's Anti-Terrorism Bill are mild by historical standards. The Bill does not suspend the writ of *habeas Corpus*. *Compare Ex parte Merryman*, 17 Fed. Cas. 144 (1861) (recounting President Lincoln's suspension of the writ of habeas corpus for a Confederate sympathizer in Maryland at the outbreak of the Civil War). The Bill does not require citizens to be tried by military commissions without a jury. *Compare Ex parte Milligan*, 71 U.S. 2 (1866) (recounting the Lincoln Administration's trial of civilians for conspiring to conduct an armed pro-Confederate uprising in Indiana). The Bill does not authorize the internment of citizens based on their race without individualized determinations that they are a threat to national security. *Compare Korematsu* v. *United States*, 323 U.S. 214 (1944) (recounting the internment of Japanese aliens and citizens who lived on the West Coast based on their race, not on any individualized evidence of a threat to national security). The Bill does not attempt to suppress anti-war speech or press articles. *Compare Abrams* v.

United States, 250 U.S. 616 (1919) (recounting the conviction under the Sedition Act of 1918 of Russian immigrants for printing pamphlets criticizing Allied intervention in Russia during World War I). And the B111 does not empower the Government to seize privately-owned, lawful businesses that are not connected with criminal activity. *Compare Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (recounting President Truman's seizure of the steel mills during the Korean War). Indeed, none of these great constitutional issues of American history concerning civil liberties in wartime are raised by this Bill.

Nonetheless, it is important to remember that our examination of this Anti-Terrorism Bill is not merely a debate for academic benefit or a means for various special interest groups to raise money. It is a choice with real-life consequences.

In my 15 years as a federal prosecutor, I saw the real impact of our criminal law on real victims. When there was a technical glitch in the law that touched on constitutional rights, it could result in a criminal set free, a victim left unvindicated, and justice left undone.

When a drug kingpin is set free by an outdated or technically deficient law, he may endanger the lives of 2 or 3 witnesses. When terrorists remained at large because of outdated and technically deficient laws, they murdered more than 5,000 people on September 11th. Thus, while we must always keep in mind our cherished constitutional liberties and our duty to protect them, we must not lose sight of the real-life impact of the decisions that we in Congress make concerning this Bill.

The Bill contains numerous provisions that would update our laws and provide our intelligence and criminal investigators the tools they need to keep up with well-financed, sophisticated, and ruthless terrorists and other criminals.

Pen Registers—The Bill would provide for nationwide application of judicial orders for installing pen registers and trap and trace devices to record telephone numbers that come to and from a particular phone. In *Smith* v. *Maryland*, 442 U.S. 735 (1979), the Supreme Court held that the use of pen registers by law enforcement to record outgoing numbers dialed from a telephone does not violate the Constitution because there is no reasonable expectation of privacy in numbers that are dialed out of a telephone. Present day criminals, including terrorists, move from State to State and change telephones regularly. Our law enforcement officers need to be able to move as fast as the terrorists.

The Bill would also allow pen register devices to record routing and address information on the Internet. It is not intended to allow the Government to read e-mail messages without a warrant. The Administration is negotiating in good faith to make doubly sure that the content of e-mail messages is not captured by these devices and thus, no Fourth Amendment issue is raised.

FISA—The Administration's Bill would amend the Foreign Intelligence Surveillance Act—FISA—to allow surveillance of an agent of a foreign power, which includes a member of an international terrorist group, with less than an exclusive or primary purpose of foreign intelligence gathering. This would allow, for example, our criminal investigators to assist our intelligence officers in arresting a criminal before he supplies a terrorist with deadly weapons. This ability to conduct more flexible surveillance is one of the few provisions of this bill that could have prevented the September 11, 2001 attacks.

Under the Bill, a court would still have to find probable cause that the target of the surveillance was an agent of a foreign power, including a member of an international terrorist group. Thus, the surveillance could not apply to an average American citizen or a run-of-themill criminal. It would apply to terrorists who break the law.

Immigration—Finally, I must express my regret that some of the immigration provisions have been eliminated from the Administration's Bill in the Senate. While lawful immigrants who work hard and contribute to our country are welcome, Congress has the broad power to deal with non-citizens in general and illegal aliens in particular. In *Reno* v. *American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491–92 (1999), the Supreme Court held that "when an alien's continuing presence in this country is in violation of the immigration laws, the Government does not offend the Constitution by deporting him for the additional reason that it believes him to be a member of an organization that supports terrorist activity." I trust that the Administration will keep this in mind as it fights our War on Terrorism.

CONCLUSION

The Administration's Bill raises none of the great constitutional issues that have confronted the country in prior wars. It is a measured response to the worst foreign attack on American soil in our history. The Bill updates our laws to allow our criminal and intelligence officers to work together quickly to track down and stop the

most immediate threat to our constitutional liberties—ruthless terrorists with no regard for law or life.

Chairman FEINGOLD. Thank you very much, Senator Sessions.

Now, I would like to turn to a distinguished member of the committee, Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Senator Feingold, thank you for this hearing, and I want to thank you on behalf of not only the committee, but the Congress, because I think it is important that we pause at some moments in our history and reflect on whether or not the decisions we are about to make will stand the test of time.

I agree completely with Senator Sessions in his note that our first obligation is to protect and defend this great Nation. But in that same Preamble that he read, they made a point of saying it was for the purpose of securing the blessings of liberty. And the question in this hearing is whether or not anything we are doing or contemplating doing is going too far.

I think that Attorney General Ashcroft and FBI Director Mueller and other law enforcement officials have done an excellent job in responding quickly to this terrible tragedy that has confronted our Nation. But now we are being confronted with the proposition of making permanent changes in law in America, and we have to really ask ourselves whether these changes will stand the test of time.

In times of crisis, our Government has often overreacted. I am a very proud son of Illinois, the Land of Lincoln, and believe him to be one of our greatest Presidents. Yet, in 1861, at the height of the Civil War, he suspended the writ of habeas corpus for secessionists and those suspected of disloyalty. Congress expanded the suspension in 1863; in World War I, the Alien and Sedition Acts, the Espionage Acts.

The so-called Palmer Raids, led by Attorney General Mitchell Palmer, included the confiscation and selling off of property and personal belongings of those who were deported; in 1940, the Alien Registration Act, and then following Pearl Harbor, the infamous Executive Order 9066 by President Roosevelt that led to 120,000 Japanese Americans being interned.

At the time, I am certain that these were immensely popular because in the midst of a national crisis, people want their security first. That is understandable. But we have got to make certain that the decisions we make in this committee are certainly consistent with our promise to secure the blessings of liberty on the people of this country. We have to give to law enforcement the tools necessary to fight terrorism in our country, and outside as well, but we hope that this can be achieved without compromising our basic liberties and rights.

Senator Feingold, thank you for raising this important issue.

Chairman FEINGOLD. Thank you, Senator Durbin.

I want to start with our distinguished panel now. I know that at least Mr. Norquist has a serious time problem. We are going to start with Mr. Kris, the Associate Deputy Attorney General at the

Department of Justice. Mr. Kris holds degrees from Haverford College and Harvard School.

I thank you for coming this morning. Before you begin, let me ask all of you to limit your remarks to five minutes. We have a large panel here and I want to make sure that the members of the committee have a chance to ask questions. Of course, your complete written statements will appear in the record of this hearing.

Mr. Kris, please proceed.

STATEMENT OF DAVID S. KRIS, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. KRIS. Thank you, Mr. Chairman and members of the committee. Thank you for the opportunity to discuss the administration's proposed legislative response to the acts of terrorism inflicted on our country on September 11.

My name is David Kris and I am an Associate Deputy Attorney General. My portfolio includes national security policy and FISA, the Foreign Intelligence Surveillance Act. I have been invited to provide information and to answer questions about how the FISA process works and how that process can be improved, consistent with the Constitution.

The additional tools sought by the administration seek to remove impediments to the vitally important coordination between law enforcement and intelligence elements in the Government. I appreciate the opportunity to discuss and answer questions in that area this morning.

The Department has sent to the Chairman and the ranking member of the Judiciary Committee, Senators Hatch and Leahy, a detailed letter from Assistant Attorney General Dan Bryant explaining why our proposed change to FISA's purpose requirement is constitutional. I understand that the committee has copies of that letter, and with respect to the sort of finer points of the constitutional analysis I will defer to the letter.

I must also note that, given the very nature of FISA proceedings, and in particular their classified nature, I may not be able to answer all of your questions this morning as fully as you would like in an open hearing. I apologize in advance for that limitation. I will do my best to provide full and complete unclassified answers. But, of course, I am also happy to brief the committee or members in a closed setting if there are matters that I can't go into at this hearing. I appreciate your understanding of that constraint.

Again, thank you for the opportunity to provide the committee with information it seeks on this important matter involving our country's fight against terrorism. Thank you.

[The prepared statement of Mr. Kris follows:]

STATE OF DAVID S. KRIS, ASSOCIATE DEPUTY ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to discuss the Administration's proposed legislative response to the acts of terrorism inflicted on our country on September 11.

My name is David Kris. I am an Associate Deputy Attorney General at the Department of Justice. My portfolio includes national security policy and FISA, the Foreign Intelligence Surveillance Act.

I have been invited to provide information and answer questions about how the FISA process works and how that process can be improved consistent with the Constitution. The additional tools sought by the Administration seek to remove impediments to the vitally important coordination between the intelligence and law enforcement elements of the government. I appreciate the opportunity to discuss and answer questions in this area.

The Department has prepared and sent to the Chairman and Ranking Member of the Judiciary Committee—Senators Leahy and Hatch—a detailed letter from Assistant Attorney General Dan Bryant explaining why our proposed change to FISA's "purpose" requirement is constitutional. I understand that you have copies of that letter. With respect to the finer points of the Constitutional analysis that underlies the Administration's proposal, I will defer to the letter.

I must also note that, given the classified nature of FISA proceedings, I may not be able to answer certain of your questions in this open hearing. I apologize in advance for that and I will do my best to provide full and complete unclassified responses. However, I am also happy to brief you and other members of the Committee in a closed setting if there are matters that cannot be discussed here this morning. I appreciate your understanding of these constraints.

Again, thank you for the opportunity to provide your Committee with the information it seeks on this important matter involving our country's fight against terrorism.

Thank you.

Chairman FEINGOLD. I thank you.

Our next witness will be Grover Norquist. Mr. Norquist is the President of Americans for Tax Reform, a coalition of taxpayer groups, individuals and businesses opposed to higher taxes at the Federal and State levels. He holds both a B.A. and an M.B.A. from Harvard University.

I thank you for appearing today.

STATEMENT OF GROVER NORQUIST, PRESIDENT, AMERICANS FOR TAX REFORM, WASHINGTON, D.C.

Mr. NORQUIST. Thank you very much. In addition to serving as President of Americans for Tax Reform, I, along with quite a number of conservative groups, have joined the In Defense of Freedom coalition. The list of ten statements of principle is included in my testimony.

I will speak for myself, but I would note that David Keane, of the American Conservative Union, has raised similar questions, and Paul Weyrich, of the Free Congress Foundation; Phyllis Schlafly, of the Eagle Forum, are all very concerned about this legislation, the particulars of it.

The most important two things, I would suggest, is I have sent a letter to every member of the House and Senate and asked them to please promise to read it before they vote for it. I did get one response asking if I was kidding, and I am not kidding. I mean that very seriously. There is a very real fear on the part of center-right groups and civic groups in the country that we will be rushing into passing something without looking at it sufficiently.

There are voices from the Justice Department demanding that you hurry up and pass it before they showed it to you. The reason people ask you to vote for something right away is they think if you read it, you might not. So I think that was troubling.

The other thing that I am pleased at is we have had a very civil national discussion on this. I am concerned the House has labeled their bill the PATRIOT bill. Those of us who may find ourselves in opposition to it have to wonder where that leaves us. I do think it is important that we have, to date, had a very civil discussion and

people have been able to raise questions without having their intentions questioned.

I would suggest five principles that you look at when you are analyzing the bill. The first is, since this is being passed in the wake of September 11, I do think it is incumbent on people trying to pass any particular piece of this to explain whether this would have had anything to do with preventing September 11.

Second, if there are new powers that we have to have to fight terrorism, then let us limit that to fighting terrorism. In the past, this body and the House passed the RICO bill, which is supposed to fight organized crime and is used to attack pro-life activists. The asset forfeiture provisions that were supposed to be used to fight the drug war have been taking people's property all over the country.

You can pass something in response to a particular problem and then 5, 10, 20 years later it is used for Lord knows what. So if it really is necessary to fight terrorism, let's put it in that that is what it is for and not usable for other things.

They sold us this stuff; we have to have this to fight the drug war, we have to have this to fight organized crime. And now they are telling us, well, of course, those are now the floors of the Government's power and the Government should have those kinds of power for all sorts of other things, not just the specific, targeted reasons that they originally sold to us.

Third: Consider sunsetting the entire package and consider sunsetting provisions. I realize that that is weak. When you pass something for three years, they tend to get put off, but better sunsetted than not sunsetted so we could at least revisit these things that we are passing in some haste in the wake of September 11.

Fourth: While you are doing this, considering reforming the institutions that manage these things. I think one of the reasons people are willing to look at the Defense Department's request for more money is that the Secretary of Defense has been out there saying we ought to have base closings, we ought to stop doing some of the expensive things we used to do and spend money on new stuff.

I am very open to a discussion from the Secretary of Defense about new ways to spend money and do things in the Defense Department because he is so serious about dropping old things. Well, I would be interested in knowing, if we are passing new laws, what old laws didn't work. What are we looking at undoing, what are we looking at reforming?

Obviously, something went wrong here, and the folks at the FBI and the CIA, I hope, are spending some time, if not in public at least with you privately, talking about where things went wrong. If somebody comes and asks for more money and more power, I kind of want to know what they were doing previously and why they need more money and more power.

If the laws have been flawed in the past, are they only flawed in one direction? They were flawed because they didn't give the Government enough power, or are they equally flawed in giving the Government too much power in some areas? I hope we can even-handedly look at that.

I raise some specifics in my testimony, and I speak on those specifics on behalf of the Eagle Forum and Free Congress Foundation, as well, because I was able to talk to them. But I am concerned specifically in the House version of this, which is an improvement over the administration's, but necessarily everything one would want in protecting civil liberties, that the use of wiretap information from foreign governments is still too promiscuously used.

Deleting the requirement from the Foreign Intelligence Surveillance Act for formal pleading to a court of law strikes me as dangerous. The asset forfeiture questions I still think are too broad. There has been some discussion about going back to the "know your customer" legislation of invading people's privacy through banks, and so on. Each of these, I think, are problematic.

Senator Hatch mentioned that he didn't see anything in here that violated the Constitution. I know that some Senators have trouble reading the Second Amendment and some trouble finding the Fourth and Fifth Amendments. But the Ninth Amendment is also in there and I would ask people to keep an eye on that when they talk about something not being a violation of the Constitution.

Thank you.

[The prepared statement of Mr. Norquist follows:]

STATEMENT OF GROVER NORQUIST, PRESIDENT, AMERICANS FOR TAX REFORM, WASHINGTON, D.C.

Thank you for the opportunity to present my thoughts on pending legislation to increase the police powers of the federal government.

My name is Grover Glenn Norquist and I serve as president of Americans for Tax Reform.

I am also a member of the large coalition of conservative and liberal civic groups entitled "In Defense of Freedom" that has come together in response to the Justice Department's recent requests for expanded police powers (see addendum).

Americans for Tax Reform has had one primary concern throughout: that the legislation cobbled together as a Justice Department wish list of powers not be pushed through Congress without the time and effort to look at what is in the legislation. I wrote a letter to all members of the House and Senate urging them to promise not to vote for any legislation on civil liberties restrictions that they had not actually read.

I did receive one fax from the Hill asking if I was kidding.

I was not.

I am delighted that leaders in the House and Senate have demanded that this legislation be read, examined, debated and the good parts enacted in a deliberative fashion, without reacting in panic.

I am also very pleased that the proponents of massive new powers for the federal government refrained from calling those of us who wanted the legislation actually read silly names. Those of us who feel strongly that the Constitution-and every little jot and tittle of the Constitution-was written on purpose, that the Second and Fourth Amendments were not mistakes, that the Fifth Amendment is not a loophole, have been able to make our voices heard in this time of national concern without people questioning our patriotism, seriousness or opposition to bad guys.

As we now consider the House of Representatives compromise legislation that has the support of serious men such as Congressmen Sensenbrenner and Conyers, as well as the legislation proposed by the Justice Department, I would urge you to keep the following principles in mind.

1. If we are passing new powers for the federal government in response to the murders of September 11, then any change in law should be asked to show how it would have stopped that terrorist act. If a new law would not have stopped the murders or helped us to catch and punish those responsible, then why are we changing the law?

2. If this is a response to terror, then the word terrorism should appear not just in the title of the bill, but the new powers should be limited to cases of terror. For example, Congress passed the RICO statutes with the promise that it would be used against mobsters and then prosecutors have turned it against pro-life organizations.

Congress gave the government powers to seize people's property-asset forfeiture-promising that it would be used against drug peddlers, and property seizures have swept the nation to the point that Congress had to revisit the statutes and reduce those powers that were being abused to the detriment of citizens.

Now we are told the government just wants to fight against terrorists. Okay, then put limits in the use of these powers to terrorist cases and terrorist cases alone.

3. Consider sunsetting all or part of the changes in law you propose. A bad law that lasts two years is less damaging than a bad law that lasts forever.

4. Along with consideration of new powers, please consider reforming the institutions that have been using the powers you have granted in the past. The Pentagon has great credibility in asking for more money for the Defense Department because Secretary Rumsfeld has led the fight for a base closings commission and to end the production of old weapons to afford the production of new weapons. An institution looking to cut away old waste and to end destructive or wasteful programs can be more seriously entrusted with new monies.

I do not to date see any effort by the intelligence community for serious self-examination, self-criticism or willingness to reform. Something went wrong. Demands for more money and more power would be more credible if they were accompanied by retirements, firings, self-criticism and a public recognition that the present intelligence agencies and their procedures are by definition flawed. If serious self-examination is going on in private, that is only a first step. A democracy must see its government reforming itself before it can be asked to grant more powers and more money.

5. If changes in the laws are needed, then what laws do you intend to remove? Is it believable that all the laws and powers passed to date are useful and productive and conducive to human liberty and security? That the only problems were too few laws? That isn't believable. The congressmen who passed the present set of powers that you now say are flawed made only one mistake: too few powers. Never too many.

The In Defense of Freedom coalition is a broad cross section of American thought. I would like to speak now for conservative groups such as the Eagle Forum and the Free Congress Foundation about some of the proposals contained in the several bills that cause us the most apprehension.

The use of wiretap information from foreign governments opens the door to introducing evidence against a US citizen in a US court of law that was gathered in a manner that violates the Fourth Amendment. It is disturbing that this vital protection against unreasonable searches and seizures could be waived.

Deleting the requirement under the Foreign Intelligence Surveillance Act for a formal pleading to a court of law and the signature of a FISA judge or magistrate to secure business documents and records and replacing it with an administrative subpoena cuts the judiciary out of the equation completely. The judicial branch was established as a check on the other two. Not allowing for judicial oversight in this instance creates an imbalance of power wholly inconsistent with our constitutional principles.

Allowing for the compelled disclosure of educational records is substantively unrelated to the effective pursuit and prosecution of terrorists, and would infringe on the privacy rights of all students throughout the nation. The National Statistics Act prohibited the disclosure of this information for reasons far better than any argument in favor of letting the government break open the seals.

Applying a uniform standard for eliminating the mandatory notice of the issuance of search warrants when there is showing to a court that such notice would jeopardize an investigation has been appropriately derided as "sneak and peek". Such a standard would unacceptably hamper judicial discretion in conferring or denying authority for conducting "sneak and peak" searches.

Expanding the authority for pre-trial asset restraint so that the government can take a defendant's property-even when the government cannot prove it is traceable to any offense-is sufficiently outrageous to not require further comment.

Unleashing the "Know Your Customer" rules on the population would be a most unforgivable action. This idea, which has been rejected every time it has surfaced, would deputize bank employees by obligating them to monitor their customers' transaction activities, and requiring them to report to the federal government any transaction that fell conspicuously outside of a particular customer's "normal" practice.

Some observers have been surprised to see the American Civil Liberties Union join with the American Conservative Union and other center-right groups such as Phyllis Schlafly's Eagle Forum, Paul Weyrich's Free Congress Foundation and Americans for Tax Reform.

I am not surprised.

While we may differ on many issues we are all Americans. America is a nation not of a single people or race, native tongue or religion. We are united by our dedication to the idea that men and women are and should by nature be free to live their lives as they see fit in liberty. The Constitution unites us. Historians have said that Afghan factions feud unless the British or Soviets invade and they unite in defense of the territory of Afghanistan.

We are Americans and we unite in defense of the Constitution and ordered liberty.

As Senators you have all sworn an oath to oppose all enemies of the Constitution-both foreign and domestic. Please, as this debate advances, keep an eye on the domestic enemies of the Constitution. They are the only ones who can do permanent damage to America.

ADDENDUM

IN DEFENSE OF FREEDOM

1. On September 11, 2001 thousands of people lost their lives in a brutal assault on the American people and the American form of government. We mourn the loss of these innocent lives and insist that those who perpetrated these acts be held accountable.

2. This tragedy requires all Americans to examine carefully the steps our country may now take to reduce the risk of future terrorist attacks.

3. We need to consider proposals calmly and deliberately with a determination not to erode the liberties and freedoms that are at the core of the American way of life.

4. We need to ensure that actions by our government uphold the principles of a democratic society, accountable government and international law, and that all decisions are taken in a manner consistent with the Constitution.

5. We can, as we have in the past, in times of war and of peace, reconcile the requirements of security with the demands of liberty.

6. We should resist the temptation to enact proposals in the mistaken belief that anything that may be called anti-terrorist will necessarily provide greater security.

7. We should resist efforts to target people because of their race, religion, ethnic background or appearance, including immigrants in general, Arab Americans and Muslims.

8. We affirm the right of peaceful dissent, protected by the First Amendment, now, when it is most at risk.

9. We should applaud our political leaders in the days ahead who have the courage to say that our freedoms should not be limited.

10. We must have faith in our democratic system and our Constitution, and in our ability to protect at the same time both the freedom and the security of all Americans.

Chairman FEINGOLD. Thank you, Mr. Norquist. I know you have another pressing engagement. You are, of course, welcome to stay as long as you would like, but feel free to leave when you need to.

Before we go to Dr. Halperin, I would like to call on the distinguished Chairman of the committee, Senator Leahy, who, of course, was kind enough to make it possible for me to hold this hearing, but more importantly immediately made sure that this committee would be focused on the proper balance of these issues of our security and civil liberties.

Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Well, thank you, Mr. Chairman. I will put my whole statement in the record. I just wanted to compliment you for doing this hearing. I think it is extraordinarily timely.

Mr. Norquist, we have heard from your staff and I appreciate the help they have offered us, as well as a number of the staff have. I am one thinks that the Bill of Rights is very important. We have issues that go to the First Amendment, the Second Amendment,

the Fourth Amendment, the Ninth Amendment, and so on, in here in the package that is before us, and we should look at all of them.

I think it would have been a mistake to have had a rush to judgment and immediately pass something, even though some were saying we should just take whatever came from the administration and pass it immediately. I think that as soon as the fine print was read by people across the political spectrum, we would have had an absolute outcry in this country had we done that.

I would just like to note one thing, Mr. Chairman, and you have spoken eloquently on this, and it is the violence that has been directed at Arab, Muslim and South Asian Americans over the past three weeks. It is abhorrent.

We are in a time when Americans of every ethnic and religious background are grieving for the loss to our neighbors and our Nation. Everybody seems touched by what has happened. The prejudice and the hate crimes that have been spawned by a tiny number of people in America is intolerable. The President, the Attorney General and the FBI Director have all reiterated that fundamental precept, and I compliment President Bush and Attorney General Ashcroft and Director Mueller for that.

Americans treat their fellow men and women with dignity and respect, not prejudice and hate. That is what makes us a great country. Guilt by association and stereotyping have no place in American law or American life. Individual accountability is at the core of our Constitution.

As the grandson of immigrants, grandparents who didn't speak any English when they came to our shores, and with a mother and a wife who are first-generation Americans who didn't speak English until they began school, I know how easy it is to stereotype people.

We are all Americans. We have all been badly, badly injured by these terrorist attacks. Let's not increase the injury to ourselves. We should value every single American, cherish them, and remember that it is that kind of diversity that made us a great Nation.

So, Mr. Chairman, you do us a great service in doing this. I thank you and Senator Durbin and Senator Sessions for taking the time. I will put my whole statement in the record.

Chairman FEINGOLD. Without objection.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

I am grateful to Senator Feingold for holding this timely hearing. Our history has taught us that in times of national crisis, we must cherish our constitutional freedoms all the more. We should bring that perspective to the ongoing negotiations over anti-terrorism legislation. We will receive advice today from witnesses with a long history of dedication to constitutional principles.

We have been discussing many constitutional issues in the wake of the terrorist attacks on America, from Fourth Amendment protections against unreasonable search and seizure to due process concerns about the treatment of legal permanent residents. These are important issues that our witnesses will discuss today. First, however, I would like to address the violence that has been directed against Arab, Muslim, and South Asian Americans over the last three weeks. In a time when Americans of every ethnic and religious background grieve for the loss to our neighbors and our nation, this prejudice—and the hate crimes it has spawned—is intolerable. The President, the Attorney General and the FBI Director have all reiterated that fundamental precept. Americans treat their fellow men and women with dig-

nity and respect, not prejudice and hate. Guilt by association and stereotyping have no place in American law or American life—indeed, individual accountability is at the core of our Constitution.

Our nation is united today against the terrorist threat, with greater strength and resolve than I have seen in my lifetime. More than that, however, I believe there is a broad consensus in our nation that we must battle terrorism without sacrificing that which makes our nation unique. Our constitutional values have united us for more than 200 years. We must improve our ability to find and punish the evildoers who attacked innocent people on September 11 and to prevent similar tragedies from occurring in the future. But we should not compromise the civil rights of our citizens in the process. We will protect our security. We will not give up our freedom. The values we hold dear are what define us as a nation. That commitment is what will allow our republic to remain strong.

The disastrous loss of life on September 11 will never be forgotten. Those losses and the damage to our economy and our great buildings—and our national psyche—cannot be minimized. But even if disaster were to strike our great Capitol or other precious monuments of marble and stone, we would rebuild and go on. Terrorists cannot take from us the ideals of Washington and Jefferson and Lincoln, or our fidelity to the Constitution.

We do not have to travel very far back into our history to find a time when we disregarded our principles in a time of crisis. Our internment of Japanese Americans in World War II was a shameful chapter in our history, and we should not repeat our mistake. The apologies we have made in recent years remind us of the long shadow cast by our worst acts, and serve as an important reminder of the dangers of overreaction.

Trial by fire can refine us or it can coarsen us. If we hold to our ideals and values, then it will strengthen us. Americans are united and all the free world, all civilized nations, all caring people join together with us. I trust that we will seek and serve justice and demonstrate to the world not only by our resolve but by our commitment to our constitutional principles that the United States remains strong even in the face of these terrorist atrocities.

Those who have attacked us hate what is best in America—our diversity and our freedom. Now more than ever, we must preserve and extend those values. Anything less would mark defeat and would dishonor those lost in the attacks and rescue efforts on September 11.

Chairman FEINGOLD. Mr. Chairman, I just want to say that I am grateful for your remarks with regard to the civil rights issues. When I had an opportunity to speak in response to this tragedy the day after September 11, I talked about our resolve as a Nation and, of course, our gratitude for all the heroism. But there were two cautions. One had to do with civil liberties and the other had to do with civil rights.

Working with you, Mr. Chairman, this subcommittee will hold a hearing in the near future on the civil rights issues concerning acts of violence and discrimination against Arab Americans, Muslim Americans, South Asians and others.

Thank you, Mr. Chairman.

With that, I am delighted to turn to Dr. Morton Halperin. Dr. Halperin is currently a Senior Fellow of the Council on Foreign Relations and the Chair of the Advisory Board at the Center for National Security Studies. Dr. Halperin has served the Federal Government in numerous capacities with the National Security Council and the Department of Defense in the administrations of Presidents Johnson and Nixon, and most recently President Clinton. Much of his work is focused on issues affecting both civil liberties and national security.

We appreciate you being here. Go ahead, Dr. Halperin.

STATEMENT OF MORTON H. HALPERIN, CHAIR, ADVISORY BOARD, CENTER FOR NATIONAL SECURITY STUDIES, AND SENIOR FELLOW, COUNCIL ON FOREIGN RELATIONS, WASHINGTON, D.C.

Mr. HALPERIN. Thank you very much, Mr. Chairman. It is a great pleasure for me to testify once again before this committee. I am testifying on behalf of the Center for National Security Studies.

I want to commend this subcommittee for holding this hearing, and I also want to commend Senator Leahy for the leadership he has shown in insisting that the Senate will look carefully at what the administration proposes and work hard to make sure that it is consistent both with our security needs and in defense of our liberties. I think we are grateful to him for the leadership he has shown, as well as to the other members of this committee who have insisted that the bill be read and that we know what we are doing before we do it.

I also want to associate myself with Mr. Norquist's statement. I think I agreed with almost every word of it, and certainly with the five principles that he suggested to you.

I thought what I might most usefully do, since the text is changing, is to try to focus on some basic principles, and in particular on the FISA legislation, and to try to remind us all how this came about and what the compromises were that led to this legislation. I might say that I was, in fact, myself deeply involved in those discussions and negotiations.

As the committee knows, until the mid–1970s the Justice Department regularly conducted warrantless electronic surveillances in the United States, and it was only after the Supreme Court brought wiretaps within the Fourth Amendment, and the abuses of the intelligence agencies were exposed so that intelligence officials began to face lawsuits and other restrictions, that the Government decided that it wanted congressional legislation—and this was the Ford administration initially—to conduct electronic surveillances for national security purposes.

It requested this authority. Again, it came up and said the bill had to be passed immediately, that not a comma could be changed. Congress insisted on detailed negotiations, which were held, and it finally agreed that it would proceed with this legislation. But there was a compromise struck and I think it is important to remember what the elements were of that compromise.

Congress gave the executive branch authority to conduct electronic surveillance for national security purposes under a different standard than the probable cause of a crime standard in Title III. Equally important, it created a special court to make sure that this information did not leak, and it permitted the Government never to have to notify the target of the surveillance that he or she had been the target, even if the person was a United States citizen and if the Government concluded in the end that the person has not committed any crime and could not be indicted.

Now, in return, the Government agreed to judicial supervision. It agreed to provisions which minimized the interception of nongermane information. Most important, the Government agreed that it would use this information only for foreign intelligence purposes,

and that it would switch to a Title III warrant if it initiated a criminal investigation.

In addition, I want to add, since the Justice Department seems to have forgotten this, that it also agreed that Title III and FISA would be the sole authority to conduct surveillances within the United States, and that FISA would be the sole authority to conduct surveillances for national security purposes.

Congress repealed the provision it had written into the original wiretap law which left open the President's authority to conduct electronic surveillances without a warrant, and the President agreed in signing the legislation that this was the sole authority to conduct electronic surveillance for national security purposes.

So to now hear the Justice Department suggest that it doesn't matter what is in FISA because the President has the authority to do this is, I think, just wrong. Whatever authority the President may have had before this legislation was enacted, we are now in Justice Jackson's famous third category, where the Congress has legislated procedures to deal with a problem. It has asserted that those procedures are the sole authority. The President signed that legislation and accepted it, and I think it is far too late for the Justice Department to argue that all of this is superfluous because we could do this without a warrant in any way we wanted to, and therefore don't look at the details of the changes.

Now, I think it is from this perspective that one must look at the proposals from the Justice Department, and the most disturbing one is the provision which would essentially allow the Justice Department to begin a surveillance even it has already decided that its primary purpose is to develop evidence to indict and convict somebody of a crime and even if that person is a United States citizen.

I think it is essential to preserve the basic compromise, which was these lesser standards were permitted because the purpose was not to gather evidence of a crime, and that the Government needs to be held to the notion that if it is seeking evidence of a crime to indict somebody, it needs to use the procedures of Title III. I think the Intelligence Committee in the Senate has developed procedures, and I think this committee is working on them, which I think will deal with that problem.

There is also the question of how you exchange information between the law enforcement investigations and criminal investigations. Here, I think we do need some changes. The recent events demonstrate that we need to find better ways to coordinate information that is developed by the FBI that needs to reach the CIA and the CIA to reach the FBI.

But I would just make two points about that. One is that the real problem is the reluctance of the agencies to share information. That is why the Senate Intelligence Committee has a provision trying to compel the FBI to share information which it is lawfully able to share.

The second problem is to make sure that we limit that to terrorism information, that we limit it to foreign intelligence information which the foreign intelligence agencies need, and we do so in an orderly way which ensures that information about lawful political activity will not suddenly disperse to the intelligence agencies.

I think my time is expired, Mr. Chairman. I appreciate the opportunity to testify here and I look forward to responding to questions.

[The prepared statement of Mr. Halperin follows:]

STATEMENT OF MORTON H. HALPERIN, CHAIR, ADVISORY BOARD, CENTER FOR NATIONAL SECURITY STUDIES, AND SENIOR FELLOW, COUNCIL ON FOREIGN RELATIONS, WASHINGTON, D.C.

Mr. Chairman,

It is a very great pleasure for me to appear again before this distinguished subcommittee.

Since the text of the legislation remains a moving target I thought it would be more useful if I stepped back and discussed a few issues in more general terms.

This committee does not have to be reminded that intelligence agencies have in the past abused their authority to spy on and even disrupt lawful political activity under the guise that those protesting the actions of our government were in fact agents of a foreign power. Now we are told that the efforts of Congress to expose those abuses, especially the work of the Church Committee, is somehow responsible for the failure of the CIA to learn about and prevent the tragic acts of September 11. This is an outrageous characterization, both because in a democracy we must be able to discuss abuses of power and discuss how to prevent them, but even more because the Church Committee report did not lead to any legislation limiting the authority of intelligence agencies. In fact, to this day, Congress has not legislated any limits on the ability of the CIA or other intelligence agencies to conduct surveillance in the United States and abroad beyond that initial prohibition in the act creating the CIA that asserted that the CIA would have no internal security functions.

This brings me to FISA which is a grant of authority by the Congress to the President and not a limit on what authority would otherwise exist. Since there is a good deal of confusion about this I want to take a moment to remind the Committee how FISA came about. I speak from having been deeply involved in the process which led to the enactment of FISA.

Until the mid-1970s the executive branch regularly conducted electronic surveillances for "national security" purposes without a court order. It was only after the Supreme Court held that wiretaps were covered by the Fourth Amendment and the scandals revealed by the Church and Pike Committees opened the intelligence agencies to threats of lawsuits and damages that the government reconsidered its position and decided that it needed congressional authorization to conduct electronic surveillance for national security purposes.

(In the interest of full disclosure, I should note for the record that I was the subject of a 21 month warrantless wiretap of my home telephone from 1969–71. After I and my family filed suit the court found that the surveillance violated our constitutional rights. Reading the governments logs of your private phone calls for an extended period does bring sharply into focus the danger of abuse and the value of privacy).

FISA thus arose from a request from the government for authority to conduct electronic surveillance for national security purposes. The government explained that it could not use Title III procedures for a number of reasons including its desire to gather foreign intelligence information even when no crime was suspected and its unwillingness ever to provide notice that it had conducted a surveillance.

Congress debated long and hard about FISA and enacted legislation that was substantially different from the original draft submitted by the administration with the usual demand that it be enacted immediately and without any changes.

In the end Congress struck a deal with the administration with the support of some civil libertarians including me (I then spoke for the ACLU on these issues). The basic compromise was this: Congress gave the executive branch the authority to conduct electronic surveillance for national security purposes under a lesser standard than the probable cause that it would gather evidence of a crime. Equally important, the government was given permission to keep the surveillance secret and not provide the notice required by Title III when the surveillance ended. In return the government agreed to judicial supervision, and provisions to minimize the interception of non-germane information. Most important, it was agreed that the government would not use the FISA procedures if it was conducting a criminal investigation and would switch to a Title III warrant if it began a criminal investigation.

Subsequently, in 1994 Congress broadened FISA to include physical searches which can be conducted even against the homes of Americans without a warrant, without knock or notice, and without ever informing the person that the government

has surreptitiously acquired information from his home. I believe that this provision is clearly unconstitutional and the Supreme Court seems to agree (See Richards v. Wisconsin (1997) holding that a blanket exception allowing no-knock entries for warrants served in drug cases violated the 4th Amendment). But that is for another day. For our purposes, we need to keep in mind that we are talking about the secret searches of the homes of Americans and not just wiretaps of foreign embassies.

It is from this perspective that the proposed amendments to FISA must be examined.

The most disturbing provision in the administration draft bill is the one permitting the government to initiate a FISA surveillance even when the primary purpose of the government is to gather evidence for a criminal prosecution. As I said, FISA authority was given to the government for situations in which it was not seeking to indict individuals for crimes, but rather to gather information for foreign intelligence purposes. To now permit these procedures to be used in a criminal investigation would almost certainly be unconstitutional and would certainly be dangerous.

Whether the change in the law is from "the" to "a" or to "significant" the result is the same. The Executive would always be able to use FISA to conduct surveillance whenever it believed that the people being surveilled were agents of a foreign power thus circumventing the notice and probable cause requirements of the Fourth Amendment.

Any legitimate problem that the government has in this area can be cured either by explicitly permitting exchanges between law enforcement officials and those conducting a FISA surveillance or by permitting the government to seek two warrants for the same surveillance, as the Senate Intelligence Committee leaders have suggested.

A second problem with the administration bill is the effort to permit the government to get warrants for six months or a year for FISA searches of individuals it suspects are agents of a foreign power as it now has for foreign powers themselves. Here again, some history may help to explain why this provision was written as it was and why it should not be changed.

When FISA was being debated in the Congress the shorter time limits on warrants applied to all targets. The government pointed out that it made no sense to go back so often if the target was, say, the Soviet embassy. And so Congress agreed to permit longer warrants for foreign powers themselves. Now the government seeks to bootstrap using this difference to argue that it should not be required to seek frequent warrants against agents of a foreign power. We need again to recall that the government has been granted the authority to wiretap a person, even an American citizen, or secretly break into his home and surreptitiously remove his papers. It is not too much to ask that the government return regularly to a specially selected judge in a separate court with full security protections to demonstrate that it was right in thinking that the target was an agent of a foreign power engaged in illegal activity.

With the indulgence of the Committee I would like to comment on two other matters raised by the Administration's draft.

The first relates to the provisions which permit the government to share information gathered for law enforcement purposes, including Title III surveillance and grand jury testimony, with intelligence officials. Given the activities of terrorists who operate both in the United States and abroad, I believe that such sharing is appropriate, but I believe it needs to be limited in several ways. First, when the information is gathered under judicial supervision, the court's approval should be required for the transfer. Second, the information transferred should be limited to Foreign Intelligence Information as that term is defined in FISA. Third, the disclosure should be limited to those officials who are directly involved in a terrorism investigation. Finally, the information should be marked and safeguarded so that these restrictions can be enforced, much as classified information is marked and stored.

Finally, I want to comment on the extraordinary proposal to include disclosure of the names of covert agents in the new list of federal terrorism crimes. This is a speech crime which has no place in this list. I was deeply involved in the development of this statute as well. Again, although the administration, in this case as with FISA, both Democratic and Republican, insisted on immediate action and no changes, Congress deliberated carefully for several years. Before it enacted the statute it insisted on a number of safeguards to insure that it would not prevent the press from publishing information it had acquired by legitimate means. For example, Congress inserted a bar on conspiracy provisions so that a reporter could not be accused of conspiring with a source. This protection and many others would be swept away if this crime remains on the list of federal terrorism crime.

Mr. Chairman, there is an important lesson in the history of the enactment of FISA and the Intelligence Agents Identities Act. It is that if we take both national security and civil liberties seriously, and if we work hard and take the time that we need we can find solutions that protect them. The Congress deserves high praise for not giving in to the administration's demand that it act first and read later in the face of the unbelievable and unfathomable events of September 11. We have gone very far in a very short time from the administration's first draft. With a little more time and a little more give and take, I believe we can arrive at a text which strikes an appropriate balance. I urge you to stay at the task.

I commend the subcommittee for holding this hearing. I appreciate the opportunity to testify and would be pleased to answer your questions.

Chairman FEINGOLD. Thank you, Dr. Halperin. That was very clear and helpful. I appreciate your being here.

Our next witness is Professor John O. McGinnis. Professor McGinnis teaches at the Benjamin N. Cardozo School of Law in the City of New York. He holds degrees from Harvard University, Oxford, and Harvard Law School. He served as Deputy Attorney General of the Office of Legal Counsel at the Department of Justice from 1987 to 1991.

I welcome you, Professor, and thank you, and you may proceed.

STATEMENT OF JOHN O. MCGINNIS, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NEW YORK

Mr. MCGINNIS. Thank you very much, Senator Feingold, Mr. Chairman, and I am very pleased to be here to speak about this important issue of how to preserve our liberties in a time of terrorism.

It is a question necessarily of a delicate balance between giving tools to our national security agencies and law enforcement, on the one hand, and preserving those civil liberties, because ultimately we want to preserve all our freedoms, not only our civil liberties, the ability to prevent intrusions from the Government, but also our other liberties, our liberty to live unharmed from the kind of atrocities that happened on September 11.

Our Constitution understands that delicate balance. The most important provision that is at issue with respect to law enforcement matters, the Fourth Amendment, prevents unreasonable searches and seizures. By using the word "unreasonable," it invites a kind of balance that is sensitive to the context.

The most important context to be reminded of here is the distinction between mere law enforcement matters and national security and war matters because there is no doubt that what happened on September 11 was not simply thousands of murders. It was, as many Members of Congress have acknowledged, an act of war against the United States.

In the context of an act of war against the United States and a foreign attack on the United States, necessarily what is reasonable changes because the context has fundamentally changed. In that regard, I think some of the provisions of this bill perhaps have been a little unfairly criticized because they don't take sufficient account of the national security context.

Let me just begin very briefly with some of the changes to FISA. The Supreme Court has always been very clear that its decisions under the Fourth Amendment have never actually applied in any-

thing like full force to foreign intelligence-gathering. Again, that is because of the different national security context.

Once again, we have to be very careful that any of these changes give these extraordinary authorities only in the national security context. But as I read the bill, the provisions would continue to require judges to make sure that there is a national security collection purpose for every gathering of intelligence authorized by FISA. That seems to me, therefore, an entirely constitutional provision.

Indeed, not to expand FISA in this way, not to allow intelligence-gathering whenever there is a purpose to gather intelligence, would mean that some national security collections would not be addressed because, of course, there are some national security collections that also have very substantial law enforcement benefits.

Under general principles of Fourth Amendment law, it does not impugn a search so long as it has a justification—here, the national security justification—if it has other beneficial justification. So I do not see any constitutional problem with the enlargement of that portion of the FISA authority.

Let me say a few words about the detention of aliens provisions. I defer to Members of Congress and to those far more expert in what our needs are to understand how far we need to detain aliens for national security purposes. But once again, there is a very strong distinction here between national security and ordinary law enforcement purposes. We are not talking about the detention of aliens for drug offenses and things of that sort.

Previously in this country when there have been wars, it has been quite well acknowledged from the first Congress that enemy aliens can be detained because they do not have the presumption of loyalty to the United States when another nation state attacks.

Of course, we are in a very different kind of war. No nation state has attacked us. We have been attacked by an irregular militia, and it is very difficult to identify those aliens within our midst who form that illegal militia. Of course, most aliens in the United States, the huge majority, are hard-working men and women who become American citizens, and it would be utterly wrong to detain people simply because they share the nationality of those people who hijacked the planes. Therefore, we need some kind of finer-grained authority that focuses simply on aliens who we have some reason to believe pose some danger to national security.

So in conclusion, Mr. Chairman, I would say that it is very important as you go forward with this bill to make a very strong distinction between contexts. The Supreme Court, and indeed common sense, recognizes that acts of war are very different from a mere law enforcement matter and may justify what are extraordinary measures, certainly measures that we should never use in ordinary law enforcement matters. Therefore, we have the FISA collection legislation, and therefore in past times of war we have detained enemy aliens.

So we want to keep a very clear line. On the other hand, there is no reason not to use this opportunity to rationalize law enforcement authorities so long as we continue with the usual principles that are applicable to law enforcement and not to national security.

The Fourth Amendment speaks of reasonableness, and that means that context is all. And the context has fundamentally

changed with the attacks on our country on September 11, and the danger of biotechnology, nuclear and chemical warfare against us. That doesn't mean we can't preserve our civil liberties. It does mean that we have to take account of the changed context in national security considerations.

Thank you, Mr. Chairman.

[The prepared statement of Mr. McGinnis follows:]

STATEMENT OF JOHN O. MCGINNIS, PROFESSOR OF LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NEW YORK

Thank you for the opportunity to testify on the "Anti-terrorism Act of 2001." This act deserves careful consideration as we attempt to preserve all our liberties—both the freedom from unwarranted intrusions by the government and the freedom to live and prosper unharmed by the new enemy that threatens mass atrocities of a kind previously unknown. This new threat to our national security raises difficult issues, because the threat is both criminal and military, and comes from enemies abroad and enemy aliens residing within our country. For instance, it is widely agreed that the attacks on the World Trade Center and Pentagon were acts of war that may require a military response both to retaliate against the perpetrators and to prevent similar atrocities. Yet they were also crimes committed on American soil investigated by the FBI and other law enforcement agencies. These investigations, in turn, may not only have law enforcement purposes but diplomatic and military purposes as evidence is gathered and shared to strengthen our coalition against terrorism.

Responding to this outrage and preventing similar outrages in the future thus tests the line between domestic and foreign affairs—a line that is important for civil liberties. In foreign affairs the federal government must exercise our common strength on behalf of the nation to defeat enemies bent on the destruction of the United States. This defense has not been and cannot be constrained by the same restrictions that properly apply to domestic law enforcement, particularly now when our enemies are bent on using weapons of mass destruction against our citizens and are delivering these weapons not by a uniformed force but by a covert conspiracy of enemy aliens secreted throughout our continent. At the same time as we address the grave threat from this irregular militia, it is, of course, important not to allow the extraordinary powers vested for national security purposes to be used for mere law enforcement purposes.

Because the bill is as yet in draft, I will not comment on (or endorse) in detail every provision but suggest instead that in its key concepts the bill as whole adheres to a constitutional line between the procedures appropriate to protect national security and those appropriate for law enforcement. The principal exceptions in this bill to the usual law enforcement requirements, such as warrants and probable cause for search and seizure, are properly limited to a single context—foreigners whose activities may undermine national security or who associate with terrorist organizations. In particular the two provisions of the bill that have been most criticized—the expansion of the Foreign Intelligence Surveillance Act (FISA) and the detention of aliens for national security reasons—fit within the conceptual framework that allows the executive branch acting with congressional approval to take action for the national security of the United States beyond that which it can take for mere law enforcement purposes.

To begin with FISA, the Supreme Court has recognized that the normal strictures of the Fourth Amendment may not apply in situations involving the protection of national security against foreign powers and their agents. Indeed, Justice White, concurring in Katz v. United States, flatly stated that the warrant procedure and a magistrate's judgment should not be required "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable." Nevertheless, under FISA Congress has decided to require that such surveillance of foreign powers or foreign agents be authorized by district courts designated by the Chief Justice of the United States. When approved by the Attorney General, the government presents application for warrants to FISA judges under in camera, ex parte procedures designed to safeguard intelligence information.

The current bill makes relatively minor revisions to the procedures for FISA application that make it easier to make expeditious requests and do not undermine any safeguards. The one change of substance is to permit FISA collection when foreign intelligence gathering is "a purpose" of the surveillance. Previously such collec-

tion was permitted only when such intelligence gathering was the sole or primary purpose of the investigation.

This change is constitutional. First, as noted above, it is not at all clear that FISA procedures are required at all when the President or the Attorney General certifies that such collection is reasonable given national security considerations. If one of the bona fide purposes of the collection of information is to promote national security, the collection is by definition reasonable in the national security context.

Even more fundamentally, so long as collection has a bona fide national security purpose (and FISA judges are available to make sure that it does) its law enforcement benefits do not undermine its national security justification. To claim otherwise would be to suggest that action which is justified to protect our national security somehow becomes illegitimate if it has other non-illicit, and possibly beneficial, consequences. Moreover, without an expansion of the FISA definition some national security objectives would go unaddressed, because some national security collections may also have substantial law enforcement benefits. Indeed, terrorist acts are simultaneously crimes and profound threats to our national security and thus it would be often difficult for the Attorney General or even a court to determine whether the primary purpose of a collection is national security or terrorism.

Finally, as a general matter of Fourth Amendment law, the Supreme Court has ruled that it is not proper to impugn a search that is legitimately justified for one purpose simply because the search has other purposes. In a recent case, the Court upheld the search of a car by a policeman who had cause to stop the car based upon a traffic violation although he was also motivated by the belief that drugs were in car. So long as a particular search is justified by a purpose appropriate to that search, the search can legitimately serve other purposes.

Now I turn to the indefinite detention of aliens if the Attorney General has reason to believe that they will engage in activity that endangers national security. It is important to note at the outset that such detention authority is not asked for law enforcement reasons, like drug interdiction. Once again the distinction between national security and law enforcement is crucial to my analysis. Assuming that the Fourth Amendment applies to national security actions, the government has special needs unrelated to law enforcement that justify detentions without individualized probable cause, because such actions are reasonable to counter the threats that those resident aliens who become terrorism's guerrillas pose to our national security. It is also reasonable not to fix a definite period for detention of such an alien. He can reasonably be detained until he can be deported or until the threat that he will engage in actions threatening to national security is abated.

The language of the Fourth Amendment is itself instructive: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Neither the text of the amendment nor its history melds the two clauses into a single provision. Nowhere does the Fourth Amendment say that all searches and seizures conducted without the warrant and probable cause required under the second clause are unreasonable under the first clause. The two clauses are therefore properly viewed as distinct. As the famous scholar, Telford Taylor noted, the Framers were concerned about "overreaching warrants" and "unreasonable searches and seizures."

The Court has thus declined to view the ascertainment of probable cause or the issue of a warrant as the sine qua non of a reasonable search and seizure. It has said: "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for a particular search against the invasion of personal privacy that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

In particular, the Supreme Court has permitted searches and seizures without a warrant or probable cause when the government has important purposes other than enforcing the criminal law. Recently the Court set out carefully its rational for searches and seizures without warrant or probable cause. Conceding that warrants and probable cause were generally required when only law enforcement matters were at stake, the Court said that searches without warrants or probable cause were constitutional "when special needs, beyond the normal need for law enforcement" make the warrant and probable cause requirement inappropriate. Once again the ultimate measure of the government procedures is "reasonableness."

In this case the government has special national security needs that are far greater than protecting the health of citizens or enforcing the immigration laws—cases where special need searches have been upheld. Consequently the justification for in-

truding on individuals is commensurately greater. Indeed, in a world where alien terrorists have used weapons of mass destruction, as they did against the United States on Sept. 11, and where they have the capacity to use even more devastating weapons, such as biological, chemical and nuclear weapons, the United States has extraordinary needs beyond simple law enforcement that may well be defeated by requiring probable cause for detaining aliens. Even if the government does not have the substantial proof required to show probable cause that aliens are engaged in a terrorist conspiracy or have information about such a terrorist conspiracy, the consequences may now be so catastrophic to the health and safety of citizens as to justify holding such aliens in detention on a less demanding "reason to believe" standard.

Another way of understanding the reasonableness of this standard is to reflect on the military nature of the threat. If a military group of saboteurs infiltrated the United States in wartime, we would not be required to extend them all the courtesies of the Bill of Rights as we try to find and hold them. The United States now faces worse threats constituted by a group of non-uniformed belligerents who are aiming at mass destruction of civilians. Although these acts take place in our country, the simple law enforcement model for controlling these acts is as inapposite as if we applied it to military saboteurs.

We should also note that this authority is appropriately limited to aliens. Unlike citizens, aliens have not taken an oath of loyalty to the United States. Thus, in wartime enemy aliens are ordinarily detained for the duration of hostilities. The constitutionality of this practice has not been questioned by the courts. Let me be clear that I would repudiate any attempt to detain citizens simply because they share the country of origin of enemy aliens. Naturalized citizens, whatever their country of origin, have every bit as much of a presumption of loyalty as citizens born in the United States. It is possible to support the constitutionality of this new authority for the Attorney General and to reject, as I do, the holding of Korematsu v. United States where the Court upheld the internment of citizens of Japanese ancestry during World War II without any showing that they were disloyal to the United States.

Today we are right to presume the loyalty of our citizens but we still face the problem of enemy aliens in our midst. But because no foreign nation state is prosecuting the war against us, we cannot determine the identity of potentially alien enemies through the old category of the alien's nation state. Nevertheless these enemy aliens are even more dangerous because they, and not others from their home countries, are the main vectors of attacks on the United States. And unlike previous wars, they may have ready access to weapons of mass destruction targeted at civilians. In these circumstances, it is reasonable to provide the Attorney General with authority to find and detain the relatively few aliens who are our potential enemies. This new kind of alien detention authority is proportionate to the new kind of war we face.

The Supreme Court has held that Congress has very substantial power in immigration matters. It is well-established that "over no conceivable subject is Congress's power more complete." To be sure, the Court recently interpreted Congress not to have authorized indefinite detention of deportable aliens in light of the serious constitutional questions that it would raise. But once again the Court expressly carved out consideration of national security matters from the scope of its constitutional concerns. It stated: "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."

Some have argued that the authority to detain aliens should not extend to those who are not flight risks. With respect, flight risk is not the only reason for detention. In a war situation, enemy aliens can pass information to one another in a network. The risk is the same in terrorist networks. Other provision of the bill have drawn objections as well. I do not have the space to address all the objections, but many can be addressed under the framework here. For instance it is appropriate to share grand jury information with government personnel to counter threats to national security. Such sharing, in the words of Alexander Hamilton, puts forward "our common strength for the common defense."

Other provisions of the bill simply rationalize the law enforcement model in light of changing circumstances. Pen registers have been upheld as applied to telephones, because according to the Supreme Court individuals have no reasonable expectation of privacy in the numbers they call because that information has been provided to the telephone company. Similarly, the routing and addresses of websites that individuals access over the Internet is available to their Internet providers. It is thus appropriate that they be made available under the same standards as pen registers for telephones. Particularly given the convergence of various forms of communica-

tions, failure to include Internet addresses and routing under the same standards as numbers would eventually make the pen register an obsolete device in the toolbox of law enforcement.

In conclusion, I would stress that many of these new provisions would simply rationalize previously existing law enforcement authorities. Such rationalization is a good idea at any time, but particularly at this time. On the other hand, the principal extraordinary authorities granted by the bill are appropriately limited to protecting national security and defending against the acts of war, not mere criminal lawbreaking, that all acknowledge now threaten the United States.

Chairman FEINGOLD. Thank you, Professor McGinnis.

Our next witness will be Jerry Berman, from the Center for Democracy and Technology. Mr. Berman is currently the Executive Director for the Center, and he has written widely on the complex civil liberties issues surrounding electronic communications. He has also served on the Child Online Protection Commission in 1999, studying methods for protecting children from objectionable material on the Internet that would be consistent with constitutional values.

We appreciate your willingness to share your expertise today and you may proceed.

STATEMENT OF JERRY BERMAN, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY, WASHINGTON, D.C.

Mr. BERMAN. Thank you, Mr. Chairman, and I again commend the committee on behalf of our organization for holding this hearing. It is critically important.

I also shared in the negotiations of the Foreign Intelligence Surveillance Act in 1978. I try to take it out of my resume to try not to date me, but I worked with Mr. Halperin and others. What was different is that we had a negotiation between civil libertarians, the Justice Department and Hill people to fine-craft this legislation.

If we do not fine-craft the legislation that is in front of us, I am afraid that what Mr. Halperin says is that the law between law enforcement and intelligence which was set up after Watergate, and by the way not in a time of peace, but in the middle of the Cold War, et up to avoid what happened during Watergate under J. Edgar Hoover—secret intelligence and broad intelligence—we wrote those restrictions to create that wall and I do not believe that wall has to come down.

The Senate Intelligence Committee has recommended that you can continue a primary purpose intelligence investigation which is secret, never disclosed to the witness, never disclosed to the target even if they are never convicted of a crime, and at the same time open a Title III warrant. You can continue under both tracks for your criminal and continue under your intelligence track, and if that requires more cooperation between law enforcement and the intelligence agencies over which information goes in which pot, that is something we would support. The cooperation is obviously necessary, so why don't we look at a dual track?

Let me turn to the Internet and some of the high-technology provisions where the Justice Department says they are simply trying to bring those into the modern age. If you listen to them talk about these sections—and I spent two hours with the Justice Department

on pen registers yesterday—they say, for example, under pen registers they are only interested in the equivalent of a telephone dialed number. That is why there is a low standard; you get the digits.

But on the Internet, those digits turn into content, the subject line, the "to/from" line, URLs, and possible Web-browsing on the Internet. They say "we don't intend that." I say, well, then why have you added this new language to the bill? We have to understand that language. They say "but that is not our intent." But those people in that room may not be here four years from now.

Viet Dinh, the leader of the Justice Department task force, said yesterday at the Internet caucus briefing, "I do not believe in legislative history. It has to be on the plain face of the statute." So we have to read a plain text and understand what it means, and if you read the plain text, pen registers covers content. And I believe it needs to be, if we are going to deal with plain text, scaled back to only cover the IP address or the equivalent of dialed telephone numbers.

In a multi-tap, roving wiretap, yes, you should put it under FISA, but it should be tied to a computer, if you are trying to get beyond phones, or any device which is under the control of the target. It shouldn't be any computer that that person may use. That is a sweeping authority.

I also call your attention to a computer trespass section, 105, which we did not pay attention to. It was the Senate Judiciary Committee who called our attention to it and said, do you want to read this again? We thought it was trespassing onto a computer service, unauthorized trespassing, to engage in delay of service and such things, where the ISP invites them on to do a surveillance.

That is a narrow emergency circumstance which is justified where you turn over information which you would otherwise get a warrant for. They do not limit it that way. They say anyone who has unauthorized access to a computer, with the permission of the ISP, you can collect all of their e-mail, all of their communications, and so forth, on the Internet without going through ECPA, which is the Title III warrant requirement for the Internet.

It is a major walk-around the statute that Senator Leahy drafted with others in 1986, which I also worked on. We have to put the language in that limits it to extreme circumstances or emergency circumstances. Otherwise, a business office owner—the FBI says we suspect he is engaging in money laundering on his computer. Be my guest, take all their records, without requiring them to go down and get a Title III warrant for electronic mail which is private communications.

The same could happen at AOL or Microsoft, where you go down and say there is an unauthorized use going down. Will you give us permission to use your network? The service provider says we will just say no. You are going to say no to the FBI? You are not going to say no to the FBI. And they are asking for civil damages immunity under this statute so that if they say yes at the wrong time, they won't be liable. But it will give our intelligence agencies too much authority.

My final point, and I could go on and on. The issue is in many cases fine-tuning, but fine-tuning requires a negotiation. Fine-tun-

ing requires getting experts to sit across a table and say let's translate what you are saying—you don't mean to do this—into the language of the statute. Unless that happens, we will have brought down the wall that exists that we built post–Watergate, and I think we will rue the day that we did it. You cannot pass legislation like that and say you have balanced national security and civil liberties. You might as well say you have suspended them for a period of time and be honest about it.

I don't think you on this ommittee want to do that. I think we can work with you. I am urging you to take the time to do it. Grover Norquist again said we can't find one restriction that impeded or caused or led to the disaster that befell us on September 11. Let us take another week and negotiate and discuss.

Thank you very much.

[The prepared statement of Mr. Berman follows:]

STATEMENT OF JERRY BERMAN, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY, WASHINGTON, D.C.

Thank you for the opportunity to testify at this hearing on the momentous question of improving our nation's defenses against terrorism in a manner consistent with our fundamental Constitutional liberties.

CDT joins the nation in grief and anger over the devastating loss of life resulting from the September 11 terrorist hijackings and attacks against the World Trade Center and the Pentagon. Like many, our relatively small staff had friends and acquaintances killed in those heinous acts. We strongly support the efforts of our government to hold accountable those who direct and support such atrocities.

We know from history, however, that measures hastily undertaken in times of peril—particularly measures that weaken controls on government exercise of coercive or intrusive powers—often infringe civil liberties without enhancing security. For that reason, we harbor serious reservations about several bills currently under discussion in this Subcommittee and elsewhere on Capitol Hill. In particular, we are deeply concerned about the Administration's proposed "Anti-Terrorism Act of 2001" (ATA). A recently-circulated alternate package, the Conyers-Sensenbrenner "Provide Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act," removes or changes a very few concerns in ATA, but retains most of the provisions damaging to civil liberties. The concerns we raise in this testimony, unless otherwise noted, apply equally to both bills.

We are deeply concerned about the impact of these bills on constitutional liberties, most particularly in two areas.

First, the ATA and PATRIOT Act tear down the "wall" between the government's authority to conduct counter-intelligence surveillance against foreign powers and terrorist groups, and its authority to conduct criminal investigations of Americans. In the post-Watergate era, Congress carefully constrained the government from inappropriately mixing its foreign intelligence and law enforcement capabilities, since such mixing would greatly infringe Americans' constitutional freedoms. The current bills eviscerate that division. Both would change the "primary purpose" standard that permits exceptional surveillance but only when counter-intelligence is "the" primary purpose of an investigation. Instead, the bills would make these extraordinary powers open to all investigations in which counter-intelligence is "a" (or, in the PATRIOT Act, "a significant") purpose (Sec. 153). As a result, they would permit law enforcement to use constitutionally suspect surveillance techniques—secret searches, bugs, and wiretapping—against Americans in criminal investigations without the protections that Congress originally intended. Besides damaging the civil liberties of law-abiding Americans who may have their communications subjected to secret interception, the bill raises the possibility that criminal prosecutions pursued in this way could be thrown out on constitutional grounds.

At the same time, the ATA and PATRIOT Act allow data collected in a criminal investigation to be shared widely, without judicial review and regardless of whether those activities serve a law enforcement or counter-intelligence purpose (Sec. 154). This would include the content of Title III wiretaps and evidence presented to grand juries, both of which are traditionally protected under law. Such a revision to the law would permit such troubling activities as the development by the CIA or other

intelligence agencies of dossiers for Americans not suspected of any criminal activity.

Second, the ATA and PATRIOT Act broadly expand the government's ability to conduct electronic surveillance and diminish the rights of Americans online. The most problematic sections in this regard are:

• Section 101. Pen Register and Trap and Trace Authority. Both ATA and PATRIOT would extend to the Internet the current, extremely permissive authority to collect telephone numbers dialed to or from a specific telephone line. But as drafted for Internet, this proposal would provide the government with much more detailed information about a monitored user. It would include not only e-mail addresses, but also URLs detailing activities such as search queries, books browsed, and online purchases. Those monitored do not need to be under investigation, and judges must issue these orders upon a showing of mere relevance, not probable cause.

• Section 106. Interception of Computer Trespasser Communications. Both ATA and the PATRIOT Act (Sec. 105) say that anyone accessing a computer "without authorization" has no privacy rights and can be tapped by the government without a court order, if the operator of the computer system agrees. This provision eviscerates current protections for electronic communications. Relatively minor violations of an ISP's terms of service—such as using foul language or downloading a copyrighted MP3 file—would allow an ISP to turn over all of that person's communications.

A range of other provisions further expand the government's surveillance authority, including:

• Section 152. Multi-Point Wiretap Authority. Authorizes FISA "roving" wiretaps, but without necessary guidelines or restrictions on this constitutionally-suspect authority. Thus, if a surveillance target is suspected of using a library computer, then all communications from that library computer might be monitored.

• Section 155. Pen Register/Trap and Trace Controls. Eliminates the only meaningful statutory control that exists on use of pen registers and trap and trace devices in intelligence cases.

• Section 154. Foreign Intelligence Information Sharing. Permits distribution of information gathered in criminal investigations—including grand jury information and Title III wiretaps—to a huge number of government employees not involved in law enforcement.

• Section 156. Business records. Allows access to any business records upon the demand of an FBI agent for intelligence or terrorism investigations with no judicial review or oversight.

• Section 157. Miscellaneous national-security authorities. Amends several key privacy laws, allowing much greater access to banking, credit, and other consumer records in counter-intelligence investigations, with no judicial review.

Mr. Chairman, we commend you and the Subcommittee for holding this hearing, and taking the time to consider the legislative proposals put forth by the Administration. Only through the hearing process can you and the American public understand what is being proposed, how it would change current law, and whether the changes are responsive to any deficiencies that the September 11 attack may have revealed. Just as President Bush and his military advisers are taking their time in planning their response, to ensure that they hit the terrorist targets with a minimum of collateral damage, so it is incumbent upon this Congress to avoid collateral damage to the Constitution.

The Center for Democracy and Technology is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values for the new digital communications media. Our core goals include enhancing privacy protections and preserving the open architecture of the Internet. Among other activities, CDT coordinates the Digital Privacy and Security Working Group (DPSWG), a forum for more than 50 computer, communications, and public interest organizations, companies and associations working on information privacy and security issues.

CONTEXT: LAW ENFORCEMENT AND INTELLIGENCE GATHERING AUTHORITIES

As you well know, the current legal structure of the intelligence community was established after Watergate both to improve intelligence and to ensure that the rights of Americans were not eroded by the vast and sometimes vague intelligence authorities that had previously existed. The legal and oversight system for intelligence sprang not just from a concern about civil liberties, but also from a concern about improving the efficacy of intelligence gathering.

A number of the provisions of the Attorney General's bill would change provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA). As the Subcommittee is well aware, FISA gave the FBI and the CIA extremely broad authority to inves-

tigate terrorism and to conduct counter-intelligence not only against foreign nationals here in the U.S., but also against American citizens suspected of involvement with terrorist groups. Unlike criminal law, where high standards of government conduct vigorously protect constitutional rights, FISA makes a special exemption for the intelligence community, permitting it to place wiretaps, install bugs, and conduct secret searches without showing probable cause of criminal conduct, giving notice, or even turning the results of the surveillance over to a court for later review. Through FISA, our intelligence community has authority to investigate a sweeping array of individuals and organizations, and through such investigations to defend against acts of terrorism.

Congress designed the FISA statute to be effective, but it recognized that such broad investigative powers, if misapplied, could threaten Americans' constitutional rights. Congress therefore demanded that the powers bestowed by FISA be strongly contained, and that a clear separation—a wall—be erected between the unique and broad standards for surveillance described in FISA, and those used in the rest of the criminal justice system. In particular, Congress wanted to ensure that surveillance under FISA would not be initiated for the purpose of criminal investigations, since such would circumvent the careful protections built into the criminal system. Rules were installed that carefully constrained FISA's usage, and the "wall" precluded information collected through FISA investigations from being used in criminal ones except in cases where the surveillance was initiated and maintained for broader foreign intelligence purposes.

Comments on Administration Proposals

The ATA and the PATRIOT Act would expand already-broad federal government authorities to conduct electronic surveillance and otherwise collect information not only on foreign nationals but on American citizens, while sidestepping constitutional protections. As described above, the bills do not adequately control that expansion, and as a result they damage civil liberties in two ways.

Both bills would change the "primary purpose" standard that permits FISA's exceptional standards to be used only when counter-intelligence is "the" primary purpose of an investigation. Instead, the ATA and PATRIOT Act propose to open FISA to all investigations in which counter-intelligence is "a" (or, in the PATRIOT Act, "a significant") purpose (Sec. 153). Such a change clearly threatens the "wall" Congress erected between the government's normal police authority and its special counter-intelligence powers, with the end result of substantially reducing American's constitutional protections before the government. The ATA and PATRIOT Act would thus permit law enforcement to use constitutionally suspect surveillance techniques—secret searches, bugs, and wiretapping—against Americans in criminal investigations without the protections that Congress originally intended. Besides damaging the civil liberties of law-abiding Americans who may have their communications subjected to secret interception, the bill raises the possibility that criminal prosecutions pursued using FISA could be thrown out on constitutional grounds.

At the same time, the ATA and PATRIOT Act allow data collected in a criminal investigation to be shared widely and used for any number of activities, without judicial review and regardless of whether those activities serve a law enforcement or counter-intelligence purpose (Sec. 154). Information that could be shared would include the content of Title III wiretaps and evidence presented to grand juries, both of which are traditionally protected under law. Certainly, the government's law enforcement and intelligence communities should be encouraged to work together, but the terms of their cooperation should be carefully defined, with, standards that serve the dual purposes of national security and civil liberties.

Such a lack of controls on the government's ability to share and distribute information about American citizens—no matter the purpose for which it was collected—leads to a situation in which entire communities (such as the American Islamic community) might have a surveillance net cast over them by the government's counter-intelligence arm. It leads to the possibility that American citizens disagreeing with the policies of a sitting Administration would have their activities monitored and logged, and dossiers created for them at the CIA or FBI. And it creates the risk that, in our desire for a nation as secure in the future as it has been in the past, we might sacrifice the elements of freedom that made this country as strong as it is.

Even as the ATA and PATRIOT Act alter the division between FISA and the government's normal police powers, they also include numerous, complex provisions extending the surveillance laws, particularly regarding the Internet, even as both bills raise many questions about how such provisions will be implemented. Many of the changes are not related to security concerns raised by the September 11 terrorist

attacks. Many are not limited to terrorism cases, but relate to criminal investigations. Some have been proposed by the Justice Department before, and some have been rejected by Congressional committees before, based on their breadth and their impact on liberty.

The proposed language includes sweeping revisions such as a modification of the pen register standard that would allow the government to intercept the content of some Internet communications without any fourth amendment protection (Sec. 101) and a new authority for Internet Service Providers (ISPs) to authorize government surveillance of their users' Internet connections (Sec. 106 in ATA, Sec. 105 in PATRIOT Act). Other changes include the so-called "roving wiretap" authority (Sec. 152), which would permit the government to intercept, for example, all Internet communications coming from a public Internet terminal (no matter who is using it) if a suspected terrorist is seen using that terminal.

As technology develops, so too should the government's ability to carry out its law enforcement and counter-terrorism functions. But injudicious changes such as those proposed in the ATA and the PATRIOT Act threaten basic freedoms guaranteed by the constitution. We therefore urge this Subcommittee and the law enforcement and intelligence communities to take a more limited, surgical approach to expanding government powers, both online and off.

A more detailed analysis of the Administration's bill follows below. Once again, we appreciate and commend this Subcommittee's efforts to gather public input and to hold this hearing today. We hope the Subcommittee will move forward with those provisions of its bill and the Administration's bill that are non-controversial and responsive to the tragic attacks of September 11, but will defer on the other more complex and divisive provisions that we have identified. We look forward to working with the Subcommittee and staff to craft an appropriate response at this perilous moment in our country's history, and to avoid a rush to judgment on legislation that could ultimately imperil both freedom and security.

EXTENDED ANALYSIS OF ADMINISTRATION BILL

The Administration's bill has two kinds of provisions that give rise to concerns: those that would lower the standards for government surveillance and those that address the difficult question of information sharing.

In terms of collection standards, our law enforcement and intelligence agencies already have broad authority to monitor all kinds of communications, including email. Both the criminal wiretap statute and the Foreign Intelligence Surveillance Act already cover terrorism. For some time, it has been recognized that those standards need to strengthen the standards for government surveillance. We see no justification for the changes proposed in the Administration bill that weaken those standards. We are particularly opposed to changes that would eliminate the judicial review that can be the most important protection against abuse.

The Foreign Intelligence Surveillance Act allows the FBI to conduct electronic surveillance and secret physical searches in the US, including surveillance of US citizens, in international terrorism investigations. FISA also authorizes court orders for access to certain business records. As you know, the standards under FISA are much lower than the standards for criminal wiretaps, and in return, the surveillance is supposed to be focused on the collection of intelligence, not criminal evidence. The FISA court, which last year approved more than 1000 surveillance requests, has denied only one request in its 22 year history.

Distinct from the Administration's unsupportable desire to avoid judicial controls on its authority, perhaps the central and most important problem facing the Congress is the question of information sharing. For many years, this has been recognized as a very difficult question; it is one that will be especially difficult to resolve satisfactorily given the pressure-cooker atmosphere of this time. We want to work out a balanced solution. But it cannot be done by wiping away all rules and barriers. Any solution needs to preserve the fundamental proposition that the CIA and other intelligence agencies should not collect information on US citizens in the US.

• Section 101. Modification of Authorities relating to Pen Registers and Trap and Trace Devices

Expands, in vague and potentially broad terms, the government's ability to get information about Internet communications under a loose standard. Also allows any magistrate in the country to issue a pen register or trap and trace order that can be served multiple times, anywhere in the country.—The government claims that it already has authority to collect, under the very weak provisions of the pen register and trap and trace statute, transactional data about Internet communications. But the existing statute, intended to collect telephone numbers, is vague as applied to the Internet. Section 101 compounds the vagueness. It would add the words "ad-

dressing" and "routing" to the description of what pen registers and trap and trace devices collect. What do these words mean?

We are concerned that the provision would be cited as expanding the scope of what the government collects, creating a more intrusive form of surveillance. Internet addressing information can be much more revealing than phone numbers and might include information about the content of communications; a URL, for example, which may fit the proposed statutory definition of "addressing" information, may include a specific search term entered into a search engine or the title of a specific book bought at Amazon.com. The bill provides no details on how this content would be separated from other addressing information. This provision is constitutionally suspect as it could allow government access to content information with minimal judicial oversight, specifically prohibited in a recent DC Circuit Court ruling. (See *USTA* v. *FCC*.)

The standard for pen registers is so low as to be meaningless: people whose communications are targeted need not be suspected of any crime; probable cause is not required, only mere "relevance" to some ongoing investigation; courts have no authority to review these orders. Before extending nationwide scope to these orders, the process for their approval needs to be given some meaningful judicial approval. Congress now should use the language approved by the House Judiciary Committee last year in H.R. 5018.

• Section 103. Authorized Disclosure

Allows disclosure of information obtained from wiretaps with any executive branch official. This is clearly too broad, especially in light of the vague language in 18 USC 2517 that allows sharing when appropriate to the proper performance of the duties of the official making or receiving the disclosure. The issue of greatest concern to us is that the CIA and other intelligence agencies would begin compiling files on US persons. This provision should be narrowed, so that it authorizes disclosures to personnel with intelligence, protective, public health or safety, or immigration duties, to the extent that such disclosure is related to proper performance of the official duties of the officer receiving the disclosure, and with the proviso that nothing therein authorizes any change in the existing authorities of any intelligence agency. (Rather than amending the definition section of Title III, it might be better to build these concepts directly into section 2517.)

• Section 105. Use of Wiretap Information from Foreign Governments. (Deleted from PATRIOT Act)

Allows use of surveillance information from foreign governments, even if it was seized in a manner that would have violated the Fourth Amendment. Section 105 makes surveillance information collected about Americans by foreign governments (so long as U.S. officials did not participate in the interception) admissible in U.S. courts even if such interceptions would have been illegal in the U.S. Such a provision is ripe for abuse and provides unhealthy incentives for more widespread foreign surveillance of U.S. individuals; we commend its removal from the PATRIOT Act.

• Section 106. Interception of Computer Trespasser Communications

Allows ISPs to waive their customers privacy rights and permit government monitoring whenever customer violates terms of service. This provision says that a person accessing a computer system without authorization has no privacy rights. If an ISP's terms of service prohibited use of the Internet account for illegal purposes, then the ISP could authorize government monitoring whenever the ISP was told by the government that a customer might be doing something illegal. If a customer was suspected, for example, of downloading music that was copyrighted, the ISP could ask the government to monitor all the person's Web activities. This proposal would swallow the entire wiretap statute as applied to the Internet, relieving the government of ever having to get court approval to read e-mail.

• Section 151. Period of Orders of Electronic Surveillance of Non-United States Persons Under Foreign Intelligence Surveillance.

Allows secret searches and electronic surveillance for up to one year without judicial supervision. Under current law, the FISA Court can order a wiretap of a "non-US person" for a period of 90 days, after which the government must report to the court on the progress of the surveillance and justify the need for further surveillance. The court can authorize physical searches for up to 45 days. The amendment would extend both time frames to one year, meaning that after the government's initial ex parte showing there would be no judicial review for one year. We think this is too long. We recommend that the current time frames be retained for the initial approval. (After all, they are already far longer than the 30 days for which criminal wiretaps, including criminal wiretaps in terrorism cases, can be approved.) If, after 90—days of electronic surveillance or 45 days of physical searches, the government can show a continuing justification for the surveillance or search authority, then we would agree that the court could authorize a longer surveillance. We would

recommend one year for electronic surveillance, 180 days for physical searches (thus preserving the current law's recognition that physical searches are more problematic than electronic searches and need to be authorized for shorter periods of time).

• Section 152 Multi-Point Authority.

Allows roving taps, including against US citizens, in foreign intelligence cases with no limits—ignoring the Constitution's requirement that the place to be searched must be "particularly described." This section purports to afford the FBI "roving tap" authority for intelligence investigations similar to what already exists for criminal investigations. See 18 USC 2518(11). A roving tap allows the government to intercept whatever phone or email account a suspect uses, even if the government cannot specify it in advance. Roving tap authority is constitutionally suspect, at best, since it runs counter to the Fourth Amendment's requirement that any search order "particularly describe the place to be searched." However, the proposed language places no limitation on the exercise of the roving tap authority and offers the FBI no guidance for its exercise. The proposed change merely authorizes the court to issue to any "person" an order commanding them to cooperate with a surveillance request by the government. If roving tap authority is supposed to focus on the targeted person, not on the telephone instrument, then the intercept authority should be limited to the target—it should only allow interception of communications to which the target of the surveillance is a party. Such limitations are absent from this proposal.

• Section 153. Foreign Intelligence Information

Allows the FBI to collect evidence for criminal cases under the looser standards of foreign intelligence investigations—an end-run around the relatively stringent requirements for wiretaps in Title III. This section, which merely changes the word "the" to "a," would actually make a fundamental change in the structure of the wiretap laws. It would permit the government to use the more lenient FISA procedures in criminal investigations which have any counter-intelligence purposes and would destroy the distinctions which justified granting different standards under FISA in the first place. Under existing law, FISA can be used only if foreign intelligence gathering is "the" purpose of the surveillance. The proposed provision would permit FISA's use if this is "a" purpose, even if the primary purpose was to gather evidence for a criminal prosecution. This is an extraordinary change in the law which has no justification.

• Section 154. Foreign Intelligence Information Sharing

With no standards, permits the sharing of grand jury information, Title III wiretap information, and any other "foreign intelligence information" acquired in a criminal case with many different federal officials not involved in law enforcement. This is a sweeping change in the law. "Foreign intelligence information" is not defined. The provision places no limits on the purpose for which the information may be shared, and no limit on its reuse or redisclosure. It requires no showing of need and includes no standard of supervisory review or approval. As written, a criminal investigator could share with White House staff information collected about foreign policy critics of the Administration. The provision, at the very least, should be drastically curtailed.

• Section 155. Pen Register and Trap and Trace Authority

Eliminates the only meaningful statutory control that exists on use of pen register and trap and trace devices in intelligence cases. The law currently requires a showing that the person being surveilled is a foreign power, an agent of a foreign power or an individual engaged in international terrorism or clandestine intelligence activities. This amendment would eliminate that standard and permit the use of FISA for pen registers whenever the government claimed that it was relevant to an ongoing intelligence investigation. Contrary to the DOJ's assertion in its section-by-section, this is not the same as the standard for pen registers in criminal cases. There, the surveillance must be relevant to an ongoing criminal investigation, which is moored to the criminal law. There is no similar constraint on foreign intelligence investigations, since they can be opened in the absence of any suspicion of criminal conduct. This provision ignores the fact that the government was granted the special rules of FISA only for situations that involved intelligence gathering about foreign powers.

• Section 156. Business records

Allows access to any business records upon the demand of an FBI agent, with no judicial review or oversight. Traditionally, the FBI had no ability to compel disclosure of information in intelligence investigations. The compulsory authorities were limited to criminal cases, where the open, adversarial nature of the system offered protections against abuse. For example, in criminal cases, including international terrorism cases, the FBI can obtain grand jury subpoenas, under the supervision of the prosecutor and the court, where the information is relevant to a criminal investigation. The FBI has no ability to invoke the power of the grand jury in intelligence

investigations, since those investigations are conducted without regard to any suspicion of criminal activity. In 1998, in an expansion of intelligence powers, FISA was amended to give the FBI a new means to compel disclosure of records from airlines, bus companies, car rental companies and hotels: Congress created a procedure allowing the FBI to go to any FISA judge or to a magistrate. The FBI had only to specify that the records sought were for a foreign intelligence or international terrorism investigation and that there were specific and articulable facts giving reason to believe that the person to whom the records pertain is an agent of a foreign power. This is not a burdensome procedure, but it brought the compulsory process under some judicial control. The Administration's bill would repeal the 1998 changes and permit the use of "administrative subpoenas" rather than an application to a court to get any business records under FISA. An administrative subpoena is a piece of paper signed by an FBI agent. There is no judicial review, no standard of justification, no oversight. Particularly in intelligence investigations, which are not even limited by the scope of the criminal law and in which there is no involvement of the US Attorney's Office, FBI agents should not have such unreviewable discretion to compel disclosure of personal information.

• Sec. 157. Miscellaneous national-security authorities

Allows much greater access to banking, credit, and other consumer records in counter-intelligence investigations. Current provisions of law allow the federal government to obtain sensitive banking, credit, and other consumer records under the relaxed and secretive oversight of FISA—but only when there are "specific and articulable" facts showing that the target consumer is "a foreign power or the agent of a foreign power." Section 157 would eliminate these essential requirement, mandating disclosure of this sensitive consumer data simply if an FBI official certifies that they are needed for a counterintelligence investigation (and with an ex parte court order for access to credit reports). Section 157 would eliminate the "agent of a foreign power" standard in-

- The Fair Credit Reporting Act, allowing access to records from consumer reporting agencies (including the names of all financial institutions where accounts are held, all past addresses and employers, and credit reports);
- the Financial Right to Privacy Act, broadly allowing access to financial records; and
- the Electronic Communications Privacy Act, allowing access to telephone and toll billing records, and, newly added, all "electronic communication transactional records."

As such, the Section would greatly increase access to the personal information of consumers or groups who are not agents of foreign powers. And in each case access the institutions granting access to consumer information would be prohibited from disclosing that information or records had been obtained.

• Section 158. Disclosure of educational records

Amends the law protecting education records to permit access to them. While this might be justified in terrorism cases, the provision covers all cases involving "national security" and is far too sweeping.

• Section 159. Presidential Authority.

Does not appear to permit judicial challenge to seizure of property. At the very least, there must be such opportunity. A second provision allows the use of secret evidence. Use of such evidence, if ever permitted, must be on a much higher standard than that the information is properly classified, as provided here. The government must be required to persuade a court that the disclosure to the party would result in imminent and serious harm and the court must require the government to provide sanitized information to the party.

• Section 352. Notice. Deleted from the PATRIOT Act.

Allows secret searches of homes and offices. For any warrant or court order to search or seize property relating to a federal criminal offense, notice of the search or seizure could be delayed if it could interfere with lawful investigations. Notice is a bedrock Fourth Amendment protection from mistaken or abusive searches and seizures. Delayed notice has been allowed in only the most extraordinary circumstances, such as wiretapping, and only with substantial judicial supervision. Section 352 represents a major erosion of this key Fourth Amendment requirement of notice.

Chairman FEINGOLD. Thank you very much, Mr. Berman.

We will now hear from Dean Douglas Kmiec, of the Columbus School of Law at the Catholic University of America. In addition to his extensive academic qualifications as a constitutional law

scholar, Dean Kmiec served as head of the Office of Legal Counsel in the Department of Justice from 1985 through 1989.

Dean, thank you for coming and you may proceed.

STATEMENT OF DOUGLAS W. KMIEC, DEAN AND ST. THOMAS MORE PROFESSOR OF LAW, COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.

Mr. KMIEC. Thank you, Senator. I appreciate your including my entire statement in the record. It is a privilege to be here to address this important subject.

The events of September 11, I believe, are ever-present in the minds of American citizens. For thousands of families, a husband, wife or child will never return home again because of what happened on that day, and I think it is very important for this committee to remember exactly what did happen on that day. It wasn't a political rally, it wasn't a non-violent speech protest, it wasn't an example of urban street crime. It wasn't even an attack by another sovereign state or nation upon the United States. It was the deliberate murder of innocent men and women, not for high political purpose or even low political purpose, but simply as the random manifestation of hate.

We talked about hate before here this morning, but I think we have to remember that that is what this was, a random manifestation of hate intended to spread panic and to fracture the civil order and continuation of American society.

But you and I know, Mr. Chairman, that Americans don't fracture that easily. We may be grievously wounded and we do earnestly want justice, and we want justice to be achieved in a rational, humane way. And our President has told us that those who perpetrated the events of September 11 will be held to account. Now, the question is how will they be held to account?

There is some prospect that they will be held to account, as Blackstone anticipated, as the enemies of mankind on the field of battle. There is also some possibility that they may be tried in a U.S. District Court. But there is yet a third possibility, one that this Nation knows from trying Nazi saboteurs in World War II and hundreds of trials in the context of the Civil War, and that is apprehending these enemies of mankind and presenting the evidence before a duly-constituted military tribunal. That also changes the character and perspective of what we are analyzing here today.

Freedom: the Founders had a very important conception of freedom. It wasn't just freedom to do anything or to associate for any purpose, but to do those things which do not harm others, and which, it was hoped, would advance the common good. Freedom separated from truth is not freedom at all, but license, and Congress can no longer afford, if it ever could, to confuse freedom and license because doing so licenses not freedom, but terrorism.

Now, I respectfully suggest that many of the objections that have been raised against this legislation are raised by people who have a much different conception of freedom than our Founders possessed, far more radical in nature, far more autonomous in nature, and also unfortunately a far less realistic assessment of the threat that is now presented to the United States.

In my judgment, Mr. Chairman, this is important legislation. It does have to be carefully drafted. I think it is being carefully drafted, and I appreciate the time this committee is spending on overseeing it. But let's remember that the Constitution is to preserve a more perfect Union, and quite frankly this Congress has already given the President of the United States a joint resolution that authorizes him not only to respond to the events of September 11, but also to any future act of terrorism.

This legislation is not unrelated to what the President needs to do. We are all concerned that the response to the events of September 11 be proportionate, be targeted, be effective in actually striking not at innocents, as the attack was on America, but at those who actually perpetrated these terrorist acts. In order to accomplish that, commission after commission have recommended a greater sharing of information between law enforcement and intelligence agencies.

There are no serious constitutional obstacles to either updating law enforcement authorities to make them consistent with the technology that presently exists or to update law enforcement authority to make terrorism at least on par with the prosecution and pursuit of drug criminals and organized crime. That is what this legislation is about.

I humbly suggest that the objections that have been raised, as Senator Hatch suggested, are not objections about constitutional law as much as constitutional policy. I think if you carefully look at some of the sections, and I know we will in the context of questioning, when we are asking for the extension of pen register information which is not protected by the Fourth Amendment, to include the Internet, we are not violating the Constitution, but providing a necessary tool to track down terrorism.

When we are authorizing a FISA warrant where there is an intelligence purpose, we are, as Professor McGinnis has already affirmed, acknowledging the context in which our civil liberties are threatened. We are not disregarding the Constitution or judicial process. FISA builds that in. It is the Congress and the President acting together, and in the context of foreign affairs and foreign policy, power is then at its zenith, as the Supreme Court has said, to address questions of this nature.

To expand the definition of terrorism in the context of immigration to include those who materially assist or associate in a knowing way, not an accidental way, not an innocent way, not for purposes of non-violent communication, but to knowingly assist terrorist activity, is not to violate the Constitution.

I know these specifics, again, will be looked at in the context of questions, so let me just end with this. I am proud of America in so many ways, including for this hearing. The fact that we live in a society where civil libertarian objection can be raised and discussed, not with hatred, not with violence, but with reason, is a testimony to the type of country we are. But let us not take that for granted. Prudence requires that we act, and act now, so that our law enforcement and military capacities can find the culprits who murdered so many innocent American citizens on September 11.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Kmiec follows:]

STATEMENT OF DEAN DOUGLAS W. KMIEC,[1] PROFESSOR OF LAW, COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.

Mr. Chairman. I am the Dean of the Law School of The Catholic University of America in Washington, D.C. As the former head of the Office of Legal Counsel in the U.S. Department of Justice in the Reagan administration, it was my duty to handle legal issues pertaining to national security and foreign intelligence, as well as to advise the President on constitutional questions brought under virtually any part of the U.S. Code.

The events of September 11 remain ever-present in the minds of American citizens. For thousands of families, a husband or wife or child will never return home because of what happened that day. The diabolical events of that morning will be forever etched in our consciousness. And yet, along with those mental pictures, it is important to grasp fully what happened: it wasn't a political rally; it wasn't a nonviolent speech protest; it wasn't an example of urban street crime; and it wasn't even an attack by another sovereign state or nation, it was the deliberate murder of innocent men and women, not for high political purpose or cause—or even a base one—but simply the random manifestation of hate intended to spread panic and fracture the civil order and continuation of American society.

But as grievously wounded as we may be, American society and its principled understanding of freedom with responsibility does not fracture or panic that easily, but it does expect that justice will be done. It earnestly desires, along with our President, to see those who so mercilessly took sacred human life to be held to account—not in a local criminal court, but by the able men and women of the military and our law enforcement communities, working together, either to eliminate on a field of battle these "enemies of mankind," as Blackstone called them, or to apprehend and punish them—presumably before the bar of a properly convened military tribunal like those employed against Nazi saboteurs in World War II.

In considering this legislation it is useful to remember that our founder's conception of freedom was not a freedom to do anything or associate for any purpose, but to do those things which do not harm others and which, it was hoped, would advance the common good. Freedom separated from this truth is not freedom at all, but license. Congress can no longer afford, if it ever could, to confuse freedom and license—because doing so licenses terrorism, not freedom. Those opposing the Anti-Terrorism Act of 2001 submitted to you by the Attorney General seem to have both a more radical view of freedom and a less sober view of the threats we face. For example, before the 1996 Anti-terrorism Act was passed, some of the opponents to this legislation claimed that terrorist threat was not particularly imminent and that existing investigative and protective authorities were adequate. "The U.S. has not been a fertile breeding ground for terrorism," opined Mr. James X. Dempsey & Professor David Cole in *Terrorism & The Constitution* 147 (1999), and further that "relatively modest, overt, non-discriminatory measures, such as metal detectors at airports protect airlines from attack." Dempsey & Cole, Terrorism & The Constitution at 153 (June 1999)]. Today, these same objectors say the existing law is just fine.

With due respect, such complacency hides a basic confusion or under-appreciation for the war against terrorism that now must be fought. The objectors think of the mass destruction of the World Trade Center and the Pentagon as the equivalent of "[m]urder, kidnapping or bank robbery." [Dempsey & Cole, supra at 159]. They think the point is a criminal trial; it is not—it is the elimination of terrorism.

The primary authority for dealing with terrorist threat resides both in the President as commander in chief, and this Congress, as the architect of various specific legal authorities, under the Constitution, to meet that threat. The President has courageously told the nations of the world that all are either for the United States in this, or with the terrorists. There is no middle ground. Similarly, the Congress by joint resolution has given President Bush authority not only to act against those wealthy and bloody hands that orchestrated the events of September 11, but all co-operators in those cowardly actions or "any future act" of international terrorism.

The President has not been rash in the use of our military might, even as he has made unmistakably plain that the "hour is coming when America will act." However, for that hour to come; for the proportionate application of our military might to become successfully manifest, this Congress must equip our law enforcement and intelligence communities with adequate and constitutional legal authority to ad-

[1] Dean Douglas W. Kmiec, and St. Thomas More Professor of Law, Columbus School of Law, Catholic University of America, Washington, D.C.

dress a war crime on a scale that previously was not seen in this generation, or seen ever, in peace time.

The Attorney General has put before you, in the form of the Anti-Terrorism Act of 2001 just such a piece of legislation. While it is still in draft form, I believe the provisions discussed herein, are fully constitutional and merit your approval. In drafting this legislative proposal, the Attorney General has given due regard to the necessary balance between the civil liberties enjoyed by our citizens under the Constitution and the law enforcement authority needed to both meet the employ of modern and global communication in terrorist plotting and the terrorist support activities of those non-citizens who come to our shores, as our guests, but who nevertheless wish to kill us.

While I suppose it is possible for some of our objecting witnesses to be right about their constitutional questions even as their appraisal of terrorist threat was so astoundingly wrong, it is only fair for this body to understand—in seeking to balance security with freedom—that the witnesses opposing the legislation do so on constitutional policy, not constitutional law, grounds. And it is further important to know that the policy of the opposing witnesses is framed by the belief that, to quote them, "there are a number of reasons to be skeptical about the claim that terrorists or their weapons have changed qualitatively. . . ." [Dempsey & Cole, supra at 152]. Regrettably, that cannot no longer be said to a stunned world community that has never before witnessed the inhumanity of using hundreds of innocents in a commercial airplane to kill thousands of other innocent noncombatants.

As you know, the legislation before you has two fundamental purposes: to subject terrorism to the same rigorous treatment as organized crime and the drug trade and to supply up-to-date law enforcement capabilities to address the technology of the day which no longer observes some of the lines previously drawn in statute. The proposed legislation is complex and proceeds in 5 parts or titles. I will not address each title or section, but will highlight some of importance and others to rebut arguments raising putative constitutional shortcomings.

In Title I dealing with intelligence gathering, section 101 is a needed change reflecting that in gathering intelligence, telecommunications is a national enterprise, not a local one, and it now includes the Internet as well as various telephonic services. Under court supervision, this section authorizes the installation of devices (pen registers/trap and trace) anywhere in the United States. Terrorists do not stop at state lines, and the ability of law enforcement to obtain such information from any person or entity supplying wire or electronic communications service is a practical necessity. Section 101 uses technologically neutral language ("routing, addressing") make it clear that it applies to all technology that is presently known, including the Internet. Basically, this section authorizes the disclosure of telephone numbers dialed or their equivalent. It poses no constitutional issue, as courts have held that pen register/trap and trace information is not subject to constitutional protection, *Smith* v. *Maryland*, 442 U.S. 735 (1979) and some case law has already been extending existing authority to email. Beyond this, the legislative proposal is explicit that the content of the communications are not included.

Section 103 of the legislation facilitates the disclosure of so-called Title III wiretap information to the intelligence community. This directly implements numerous commission recommendations that law enforcement and intelligence personnel eliminate artificial lines separating them in the context of a terrorism investigation. Presently, 18 U.S.C. 2517(1) allows any wiretap information to be shared if it assists another criminal investigation. The universe of individuals authorized to receive wiretap information under the proposal is larger than that, but is rationally limited to law enforcement, intelligence, national security, national defense, protective, and immigration personnel or the President or Vice-President. I understand that the House version further adds that the sharing is appropriate only when it relates to foreign intelligence information. This germaneness standard is workable, and the authority requested presents no constitutional issue. There is no basis to fetter this sharing of information upon court order since that would in essence make sharing of information less possible in a terrorism investigation than in common criminal practice today where federal prosecutors share this information with state law enforcement officers investigating local crime.

A good deal of debate has focused upon section 153 and the expansion of the Foreign Intelligence Surveillance Act (FISA) 50 U.S.C. sections 1800-1863 to circumstances that are not primarily intelligence related, but have foreign intelligence merely as one of its purposes. The Attorney General posits that this will eliminate the need to constantly re-evaluate whether the intelligence purposes of an investigation outweigh the criminal objectives.

While the distinction between primary purpose and one purpose mirrors lower court case law designed to insure the observance of Fourth Amendment protections

in criminal cases, the distinction makes little sense where both intelligence and law enforcement communities must work side by side in the war on terrorism. It is also a distinction that has never been formally made by the Supreme Court. Gathering intelligence without meeting the stringent probable cause and notice elements of a traditional Title III criminal investigation are essential to tracking down terrorist activity. The real distinction should not be between intelligence and criminal purposes, but whether the surveillance or search is being effectively directed at terrorist activity, especially that from a foreign source, without having to decide whether at any given time one purpose or the other predominates.

In my judgment, this greater flexibility does not present a constitutional violation.

First, a little bit of background. Before FISA, wiretapping for national security purposes was essentially unregulated. In 1972, the Supreme Court, in *United States* v. *United States District Court*, 407 U.S. 297 (1972)—the so-called Keith opinion—ruled that wiretaps conducted for purposes of domestic security violated the Fourth Amendment unless a warrant had been obtained from a court before the surveillance was conducted. However, the Court declined to hold that this warrant requirement also applied to surveillance of foreign governments or their agents.

Congress established procedures for law-enforcement wiretapping in 1968, including a requirement of probable cause that a crime had been or would soon be committed. This statute created significant protections against wiretapping in most situations, but it again specifically exempted national security searches from its scope. Congress provided that "nothing in the Act limited the President's existing constitutional power to obtain foreign intelligence or protect national security." 18 U.S.C. 2511(3) (1968).

The Carter administration following congressional study sought the enactment of FISA while nevertheless contending, as most presidents have, that the Executive has inherent power to conduct warrantless electronic wiretapping for national security purposes. Certainly, in this regard, it can be tenably argued that the President's Article II responsibilities may be sufficient in themselves in an emergency of the type we presently face. Aside from this inherent Executive claim, emergency statutory authority is expressly confirmed in FISA insofar as the Attorney General may authorize immediate surveillance without court order. 18 U.S.C. 1802(a)(1). The Act also authorizes the conducting of electronic surveillance without a warrant when the Attorney General certifies in writing and under oath that (among other conditions) the government will comply in statutory "minimization procedures" (relating to the unnecessary dissmenination of nonpublic information), and that there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a "United States person" is a party.

In all other circumstances, the government may only conduct electronic surveillance pursuant to FISA's advance procedure for judicial review. The application for the search order must contain the approval of the Attorney General, a description of the target of the surveillance, and proposed minimization procedures. The application must also include a statement of facts demonstrating probable cause that the target is either a foreign power or an agent of a foreign power, and that the facilities to be searched are being used or are about to be used by a foreign power or an agent of a foreign power. Finally, the application must include certification from an appropriate executive branch official that the information sought is foreign intelligence information, that the purpose of the surveillance is to obtain foreign intelligence information, and that normal techniques could not obtain the desired information. The executive official must present facts to support these certifications, but as against foreign powers or agents thereof, no showing of probable cause is required.

As suggested above, FISA provides a heightened standard of review for United States persons, which includes both citizens and aliens lawfully admitted for permanent residence. FISA expressly provides that United States Persons shall not be subject to FISA surveillance solely on the basis of their constitutionally protected First Amendment rights.

None of these protections are altered by the proposed legislation. Can it thus truly be claimed that allowing FISA to be applied in criminal prosecutions is unconstitutional if foreign intelligence is only one, and not the primary, purpose? No. At worst, should the Supreme Court observe the primary purpose distinction that has been indulged in lower courts, the consequence may be a denied warrant, or if a warrant issues, suppression of evidence. All proposed section 153 does is eliminate the statutory basis for judicial challenge to acquired evidence in a subsequent Article III trial of a terrorist suspect. Without the statutory impediment that the Attorney General seeks to eliminate, to find unconstitutionality under the Fourth Amendment, the Supreme Court would have to both disregard the longstanding claims of inherent presidential authority to protect the national security interests of the United States and, in a circumstance like the present national security emergency, the fact of that

emergency. Warrant requirements need not be followed where there is special government need. Searches without warrants or probable cause are generally constitutional "when special needs, beyond the normal need for law enforcement" make these elements unworkable. *Veronia School District 47J* v. *Acton*, 515 U.S. 646 (1995). The constitutional standard for all searches or surveillance is "reasonableness."

Confronting the present terrorist threat is surely reasonable and meets that special need. Now more than ever our national security requires "the utmost stealth, speed, and secrecy." *United States* v. *Truong Ding Hung*, 629 F.2d 908 (4_{th} Cir. 1980) (adopting the foreign intelligence exception to the Fourth Amendment). A warrant requirement adds a procedural hurdle that reduces the flexibility of executive foreign intelligence initiatives launched in the aftermath of September 11 and before, and in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. See *Zweibon* v. *Mitchell*, 516 F.2d 594, 704 (D.C.Cir.1975) (Wilkey, J., concurring and dissenting).

There is also the matter of institutional competence. The executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. True, courts possess expertise in making the probable cause determination involved in surveillance of suspected criminals, but they are not proficient in military affairs, which is what is most essential to our nation's security in the present climate. Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the "probable cause" to demonstrate that the government in fact needs to recover that information from one particular source. Even the special court created by FISA comprehends the reality of judicial limitation by prescribing a "clearly erroneous" standard of review.

In contemplating the constitutionality of proposed section 153, the Supreme Court would also be certain to acknowledge that the executive branch not only has superior expertise in the area of foreign intelligence, but also, as even the lower courts tendering the primary purpose rationale admit, is the constitutionally designated authority in foreign affairs. See *First National Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 765-68 (1972); *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302 (1918). The President is tasked by the constitution with the conduct of the foreign policy of the United States. See *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304 (1936). Just as the separation of powers in Keith forced the executive to recognize a judicial role when the President conducts domestic security surveillance, 407 U.S. at 316-18, so the separation of powers would enjoin the Court in all likelihood to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance. In my judgment, this should extend to the question of whether the pursuit of terrorists with FISA authority is at any given time more a military, than a criminal prosecution, objective.

It must be remembered that FISA itself did not transfer the traditional Fourth Amendment warrant requirement unaltered into the foreign intelligence field. As suggested earlier, the statute does not contain a blanket warrant requirement; rather, it exempts certain categories of foreign intelligence surveillance. 50 U.S.C. 1802. Nor does the statute require the executive to satisfy the usual standards for the issuance of a warrant; the executive need demonstrate only probable cause that the target is a foreign power or a foreign agent and, in the case of United States citizens and resident aliens, that the government is not clearly erroneous in believing that the information sought is the desired foreign intelligence information and that the information cannot be reasonably obtained by normal methods. 50 U.S.C. sections 1805 and 1804(a)(7)(E).

Of course, insofar as the above authorities sanction section 153 in general, it especially does not contravene constitutionally protected privacy interests in the context of pursuing terrorist activity. Almost by definition in such context foreign intelligence is a sufficient purpose.

Turning to Title II and the immigration proposals, it is evident that a broadened definition of terrorist is needed. Under current law, an alien is inadmissible and deportable for engaging in terrorist activity only when the alien has used explosives or firearms. Opponents of the Attorney General's proposal claim the new definition of terrorism is too broad. For example, Professor Cole specifically objects to adding the words "or other weapon or dangerous device" to section 201(a)(1)(B) (ii), which—as noted—presently prohibits only the use or threat to use any "explosive or firearm." Professor Cole asserts that expanding the term to include a residual category of other weapons trivializes terrorism. This is not constitutional law, it is opinion.

And I dare say is not the opinion of the families of the innocent men and women who had their commercial airliner turned into a "weapon and dangerous device," or whose family members were killed with a "box cutter" en route. It is not likely the opinion of the families who lost loved ones in the World Trade Center or the Pentagon or in rural Pennsylvania. Perhaps, prior to September 11, we could be lulled into the notion that not even terrorists would conceive of using innocent human beings as a weapon against other innocent human beings on our own soil, but sadly that is no longer our reality. Hypotheticals that the statute might be contorted to apply to a barroom brawl or a domestic dispute overlooks the reason we have been called here, demeans the judgment of federal officers, and are quite simply, too facetious to be credited as a legal objection.

Similarly, opponents of this legislation are concerned that aliens who associate with terrorist organizations may be deported when their purported association has somehow been confined to the non-terrorist functions of the organization. Terrorists unfortunately gain financial and other support hiding behind the facade of charity. Those opposing this new immigration authority seem undisturbed by this. That is again a policy choice; it is not a constitutional one. A statute, like proposed section 201, aimed at supplying a general prohibition against an alien contributing funds or other material support to a terrorist organization (as designated under current law by the Secretary of State) or to any non-designated organization that the alien "knows or reasonably should know" furthers terrorist activity does not violate the Constitution. Loosely citing cases that prohibit assigning guilt by association are inapposite. The cases cited by opponents of this legislation deal with domestic civil rights and the like pertain to the nonviolent association of American citizens not the fanatical planning of non citizens.

Eliminating terrorism requires not just excluding terrorists as individuals, but individuals who engage in terrorist activity either in an individual capacity or as a member of an organization. There is nothing unconstitutional about this. The Constitution does not require that associations of terrorists be ignored. Yes, the government must prove specific intent in a criminal trial that the individual had made the association to advance unlawful purposes. Section 201 envisions just that. "Engaging in terrorist activity" means committing a terrorist act or otherwise committing acts that "the actor knows, or reasonably should know, affords material support . . . .to any organization that the actor knows, or reasonably should know, is a terrorist organization, or to any individual whom the actor knows, or reasonably should know, has committed or plans to commit any terrorist activity." The specific intent requirements are not only explicit, but multiple. It is thus a blatant fabrication on the part of the objectors that the proposal severs "any tie between the support provided and terrorist activity." This is not, as the objectors claim, "guilt by association," but guilt for associating with terrorists for terrorism purposes.

The proposed legislation likewise does not punish those who innocently may support a front organization or even may support an individual who had previously committed a terrorist activity if the alien establishes "by clear and convincing evidence that such support was afforded only after that individual had permanently and publicly renounced and rejected the use of, and had cease to commit or support, any terrorist activity." Section 201 (a)(1)(C)(iii)(V).

The witnesses against the Attorney General's well-conceived proposal also mislead by mis-citation. They would have the committee believe, as one witness said last week in opposition before the Intelligence Committee, that "[t]he First and Fifth amendments apply equally to citizens and aliens residing in the United States." [Cole statement at n. 3, citing *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953)]. However, this cannot be said without qualification. With regard to exclusion of immigrants, U.S. authority is plenary. *Yick Wo* v. *Hopkins*, 118 U.S., at 369; Kwong Hai Chew, 344 U.S., at 596, n. 5. ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.") And the Court has long held that "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." United States ex rel. *Knauff* v. *Shaughnessy*, 338 U.S. at 544.

Terrorists or those seeking association with them clearly can be excluded from our Nation without offending the First Amendment or any other provision of the Constitution. While additional rights attend an immigrant granted admission, they are not on par with citizens. In *U.S.* v. *Verdugo-Urquidez*, 110 S.Ct. 1056 (1990), for example, the Court opined that: "[Our] cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. See, e.g., *Plyler* v. *Doe*, 457 U.S., at 212 (The provisions of the Fourteenth Amendment "'are universal in their application, to all persons within the territorial jurisdiction. . . .'").

These leads to the question of whether those posing terrorist threat can be detained by the Attorney General. The detention provision has been the subject of much debate and as of this writing was still in flux. The Senate version of section 203 provides for this insofar as "[t]he Attorney General may certify [for detention] an alien to be an alien he has reason to believe may commit, further, or facilitate [terrorist] acts . . . . or engage in any other activity that endangers the national security of the United States." The objectors to the legislation recite, erroneously, that the proposal mandates indefinite detention. As the quoted language above indicates, the Attorney General's certification is permissive (may, not shall), even as following certification, the detention naturally follows. It would be illogical if it did not.

Is this detention based on certification unconstitutional? Not even the opponents claim this; instead, they opine it raises "constitutional concerns." They especially say this would be true if it were used to detain those giving "peace training to the IRA." Any statute can be made to raise constitutional concerns if it is manipulated to apply against something other than its constitutional object. The Congress is not tasked with drafting against the absurd. It is tasked with addressing the very real dangers of those who wish to kill us for no reason other than we are American. The Attorney General can be given authority to address such hatred. He can also be given the authority to address the risks posed by enemy aliens who may flee or who may seek to thwart our security by exchanging information or launching an additional attack.

But, claim the objectors, the Attorney General cannot be given authority to detain persons he cannot deport. Perhaps, but that is not the question that needs to be answered. The Attorney General has not asked for that authority. He seeks to detain those who have been found to be removable, but for various reasons (mostly related to international obligations to avoid repatriation to a country where torture is inevitable), cannot be removed immediately. Existing law allows aliens to be removed not only when they were originally inadmissible or convicted of a crime or for violation of immigration status, but also for national security or foreign relations reasons, or as implied under the existing post-removal statute, when the alien is "determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." 8 U.S.C. 1231(a)(6) (1994 ed., Supp. V) and 8 C.F.R. 241.4(a) (2001). This post-removal detention period authority was recently construed by the Supreme Court in *Zadvydas* v. *Davis*, 121 S.Ct. 2491 (2001). This case of statutory interpretation does not rule out indefinite detention where dangerousness is accompanied by special circumstance. 121 S.Ct. at 2499. The Court explicitly noted that in establishing a presumptive six month period for detention nothing prevents the government from continuing detention with evidence of likely removal. Most relevantly, the Court did not even apply the presumptive six month detention limit to cases of detention for terrorist activity or its support. Wrote Justice Breyer for the Court:

Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security. 121 S.Ct. at 2502.

The detention by Attorney General certification thus raises none of the constitutional problems suggested by the legislation's detractors. Morever, even the opponents of this carefully-drawn legislation must and do concede that it adequately provides for judicial review of the Attorney General's determination.

It should be noted that the House version of Section 203 is a bit different, providing, in addition to detention following a removal decision, for short-term detention of a suspected terrorist for up to seven days before charging an alien with a crime or a basis for removal. If no charges are filed, the alien is released. The House version provides for habeas review in the U.S. District Court of the District of Columbia of any decision to charge an alien. Under current regulation, INS may detain an alien for 48 hours before charging a crime or removable offense. Extending this time of detention without charge may raise more legal questions than the Senate version, which as explained by its proponents did not apply to an alien who was not already determined to be subject to removal. Whether a constitutional problem is presented by the House version likely depends upon the extent of due process protection afforded an individual alien in light of the degree of his or her substantial connection with this country. See, Plyler, supra.

Raising civil libertarian objections to new law enforcement provisions is a healthy sign of a vibrant democracy committed to human rights. America should be justly proud of its temperate actions in response to September 11, and its debate. Disagreement is not a sign of disrespect. However, with regard to the provisions discussed above, Congress should proceed to enactment since no significant constitutional objection has been raised. Should Congress nevertheless fear that the power

asked for might be abused, the prudent course would not be to deny the needed authority, but to draft a cause of action for damages to rectify possible misapplication, or to provide for a sunset of the authority after a period of time sufficient to meet the present exigency. The possibility of abuse should not obscure the present need and the supposition of trust that one must have if our democratic order is to be safeguarded from those outside our borders who wish to subvert it.

Thank you for the opportunity to appear before you this morning.

Chairman FEINGOLD. Thank you, Dean. I am intrigued by this distinction between constitutional law and constitutional policy. I do think that there are questions of constitutional law here, but surely if there is such a separate area as constitutional policy, that is even more our responsibility than the United States Supreme Court because we are here to make policy. But I do appreciate your testimony.

Now, I would like to turn to Professor David Cole. Professor Cole currently teaches at Georgetown University Law Center and he has long been associated with the Center for Constitutional Rights. In addition to litigating several important First Amendment before the United States Supreme Court, Professor Cole has written extensively on the issue before us today, co-authoring the book *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*.

I welcome you, Professor, and you may proceed.

STATEMENT OF DAVID COLE, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

Mr. COLE. Thank you, Senator Feingold.

Precisely because the terrorists violated every principle of civilized society, of human decency and of the rule of law, we must, in responding to the threat of terrorism, maintain our commitments to principle. I want to suggest three principles.

First, we should not overreact, as we have so often overreacted in the past in times of fear.

Second, we should not sacrifice the constitutional principles for which we stand.

Third, in balancing liberty and security, we should not trade the liberties of a vulnerable group—immigrants, and particularly Arab and Muslim immigrants—for the security of the majority.

Unfortunately, the immigration provisions that have been advanced by the Bush administration, that have been proposed in the House and that are now being considered in the Senate–Justice Department negotiation violate all three principles. They overreact because they impose guilt by association for wholly innocent associational activity, and they authorize indefinite detention on the Attorney General's say-so of any such alien.

They sacrifice our constitutional principles, and this is constitutional law, not constitutional policy. Guilt by association, the Supreme Court says, violates the Fifth Amendment and the First Amendment, both of which apply, the Supreme Court has said, without distinction to citizens and aliens living here.

Executive detention without any showing of current dangerousness or risk of flight, which is what the mandatory detention provision in the House bill would authorize, violates both substantive due process and procedural due process. And in reacting this way, we are trading the liberties of the few, of those without a voice, of

immigrants who can't vote, and particularly Arabs and Muslims, for the purported security of the rest of us.

These are provisions which will, we know, be targeted at Arabs and Muslims, and not for their individual conduct, but for their group identity, the very type of thinking that underlies the hate crimes that we all so virulently oppose.

First, guilt by association. Current law makes aliens deportable for terrorist activity, for supporting terrorist activity, for planning, facilitating, or encouraging terrorist activity any way, shape or form. The Bush proposal makes aliens deportable for any associational support of any group that has ever engaged in or used violence. There is no requirement of any nexus between the alien's support and the actual violence.

If an immigrant in the 1980s gave money to the African National Congress to support its non-violent struggles against apartheid, just as thousands of Americans did, he would be deportable under this statute for providing support to a terrorist organization. The African National Congress also engaged in violent opposition to apartheid. The African National Congress was listed every year until it came to power as a terrorist organization by the Secretary of State. That wholly innocent activity would be a deportable activity. Is that a measured response? No.

Even if the alien shows that his support was designed to counter terrorist activity, that is no defense. So if an alien today wants to further the peace process in England by providing peacemaking training to the IRA, he is deportable. Even if he can prove that his support furthered peace and countered terrorism, he is deportable. Is that a measured response? I suggest no.

The mandatory detention provisions are also clearly and plainly unconstitutional, for two reasons. First of all, they are essentially a form of preventive detention. The Supreme Court has held that preventive detention is only permissible under narrow circumstances where the Government shows dangerousness to others or risk of flight. Under the House bill and the Bush proposal, the Government would be permitted to engage in preventive detention without any showing of dangerousness to others or risk of flight.

Under the House bill, all they have to show is that they have reasonable grounds to believe that someone is described in the terrorist activity provisions of the bill. But then the terrorist activity provisions of the bill are defined so broadly that they include every violent crime other than an armed robbery—every violent crime other than an armed robbery. That is not what the man on the street understands to be terrorism, that is not what the international community understands to be terrorism, and that is not a narrow class of people who pose a particular danger to society. Yet, that is the class of people who would be subject to mandatory detention under this provision.

In addition, it would apply to people who gave money to the African National Congress or who gave peace-making training to the IRA. Even if there is no evidence that those people pose a threat to national security or pose a risk of flight, the statute would authorize their detention.

The second problem: it authorizes indefinite detention. There have been news reports that have suggested erroneously that the

House solves this problem by requiring the filing of charges within seven days. That is wrong because whether or not charges are filed doesn't matter. The statute provides that mandatory indefinite detention of aliens is permitted.

Even if the alien prevails in his deportation proceeding and cannot be removed and has a right to remain here permanently, the statute provides for mandatory detection, not on a finding that the alien is a danger to society, but solely on a finding that the Attorney General had reasonable grounds to believe that he engaged in a crime of violence, that he was in a domestic dispute where he picked up a plate and threw it at his wife, or he was in a bar and picked up a broken bottle. That would constitute sufficient grounds for mandatory detention. That, I submit, is not a narrow, measured response. It is not the kind of careful consideration of civil liberties that we should be demanding in this time of fear. It is unfortunately precisely the kind of overreacting that we have so often seen in the past.

Thank you.

[The prepared statement of Mr. Cole follows:]

STATEMENT OF DAVID COLE,[1] PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.

INTRODUCTION

The deplorable and horrific attacks of September 11 have shocked and stunned us all, and have quite properly spurred renewed consideration of our capability to forestall future attacks. Yet in doing so, we must not rashly trample upon the very freedoms that we are fighting for.

Nothing tests our commitments to principle like fear and terror. But as we take up what President Bush has called a fight for our freedoms, we must maintain our commitments to those freedoms at home. The attack of September 11, and in particular the fact that our intelligence agencies missed it entirely, requires a review of our law enforcement and intelligence authorities. Everyone agrees that more should be done to ensure the safety of American citizens at home and abroad. But we must be careful not to overreact, and should therefore insist that any response be measured and effective.

Three principles must guide our response to threat of terrorism. First, we should not overreact in a time of fear, a mistake we have made all too often in the past. Second, we should not sacrifice the bedrock foundations of our constitutional democracy—political freedom and equal treatment. And third, in balancing liberty and security, we should not trade a vulnerable minority's liberties, namely the liberties of immigrants in general or Arab and Muslim immigrants in particular, for the security of the rest of us.

The Administration's proposal seeks a wide range of new law enforcement powers. I will focus my remarks on the immigration section of the Administration proposal. In doing so, I will also refer to the Sensenbrenner-Conyers bill, referred to as the PATRIOT Act, recently introduced in the House. In my view, the Administration's proposal is neither measured nor effective, and unnecessarily sacrifices our commitment to both equal treatment and political freedom. The PATRIOT Act mitigates some of the troubling aspects of the Administration's proposal, but remains deeply problematic, and unconstitutional in several respects. I will focus my remarks on the Administration's proposal, but will also note where the PATRIOT Act differs. The Administration's proposal has four fundamental flaws:

1) It indulges in guilt by association, a concept that the Supreme Court has rejected as "alien to the traditions of a free society and the First Amendment itself." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 932 (1982).
2) It would apply its newly expanded deportation grounds for associational activity retroactively, making aliens deportable for activity that was wholly legal at the time they engaged in it.

[1] Professor, Georgetown University Law Center, and attorney with the Center for Constitutional Rights.

3) It authorizes the INS to detain immigrants potentially indefinitely, even where they cannot be deported and have a legal right to live here permanently.
4) It resurrects ideological exclusion—the notion that people can be excluded for their political beliefs—a concept Congress repudiated in 1990 when it repealed the McCarran-Walter Act.

HISTORY

I will address each of these problems in turn. But before doing so, it is worth reviewing a little history. This is not the first time we have responded to fear by targeting immigrants and treating them as suspect because of their group identities rather than their individual conduct.

In 1919, a series of politically motivated bombings culminated in the bombing of Attorney General A. Mitchell Palmer's home here in Washington, DC. Federal authorities responded by rounding up 6,000 suspected immigrants in 33 cities across the country, not for their part in the bombings, but for their political affiliations. They were detained in overcrowded "bull pens," and beaten into signing confessions. Many of those arrested turned out to be citizens. In the end, 556 were deported, but for their political affiliations, not for their part in the bombings.

In World War II, the attack on Pearl Harbor led to the internment of over 100,000 persons, over two-thirds of whom were citizens of the United States, not because of individualized determinations that they posed a threat to national security or the war effort, but solely for their Japanese ancestry. The internment began in April 1942, and the last camp was not closed until four years later, in March 1946.

In the McCarthy era, we made it a crime even to be a member of the Communist Party, and passed the McCarran-Walter Act, which authorized the government to keep out and expel noncitizens who advocated Communism or other proscribed ideas, or who belonged to the Communist Party or other groups that advocated proscribed ideas. Under the McCarran-Walter Act, the United States denied visas to, among others, writers Gabriel Garcia Marques and Carlos Fuentes, and to Nino Pasti, former Deputy Commander of NATO, because he was going to speak against the deployment of nuclear cruise missiles.

We have learned from these mistakes. The Palmer Raids are seen as an embarrassment. In 1988, Congress paid restitution to the Japanese internees. In 1990, Congress repealed the McCarran-Walter Act political exclusion and deportation grounds. But at the time these actions were initially taken, they all appeared reasonable in light of the threats we faced. This history should caution us to ask carefully whether we have responded today in ways that avoid overreaction and are measured. to balance liberty and security. In several respects detailed below, the Administration's proposed Anti-Terrorism Act fails that test.

COUNTERTERRORISM AUTHORITY IN EXISTING LAW

In considering whether the Administration's bill is necessary, it is important to know what authority the government already has to deny admission to, detain, and deport aliens engaged in terrorist activity. The government already has extremely broad authority to act against any alien involved in or supporting any kind of terrorist activity:

1. It may detain without bond any alien with any visa status violation ifit institutes removal proceedings and has reason to believe that he poses a threat to national security or a risk of flight. The alien need not be charged with terrorist activity. 8 U.S.C. § 1226, 8 C.F.R. § 241 The INS contends that it may detain such aliens on the basis of secret evidence presented in camera and ex parte to an immigration judge.
2. It may deny entry to any alien it has reason to believe may engage inany unlawful activity in the United States, and to any member of a designated terrorist group. It may do so on the basis of secret evidence. 8 U.S.C. § 1182(a)(3).
3. It may deport any alien who has engaged in terrorist activity, or supported terrorist activity in any way. Terrorist activity is defined under existing law very broadly, to include virtually any use or threat to use a firearm with intent to endanger person or property (other than for mere personal monetary gain), and any provision of support for such activity. 8 U.S.C. § 1227(a)(4). Pursuant to the Alien Terrorist Removal provisions in the 1996 Antiterrorism Act, the INS may use secret evidence to establish deportability on terrorist activity grounds.

4. Relatedly, the Secretary of State has broad, largely unreviewable authority under the 1996 Anti-Terrorism and Effective Death Penalty Act to designate "foreign terrorist organizations" and thereby criminalize all material support to such groups. 8 U.S.C. §1189, 18 U.S.C. §2339B. This provision triggers criminal sanctions, and applies to immigrants and citizens alike. Osama bin Laden's organization is so designated, and thus it is a crime, punishable by up to 10 years in prison, to provide any material support to his group.

THE ADMINISTRATION'S PROPOSED ANTI-TERRORISM ACT

The immigration provisions of the Administration's Anti-Terrorism Act: (1) expand the grounds for deporting and denying entry to noncitizens; (2) expand the Secretary of State's authority to designate and cut off funding to "foreign terrorist organizations;" (3) create a new mandatory detention procedure for aliens certified as terrorists by the INS; (4) authorize the Secretary of State to share certain immigration file information with foreign governments; and (5) require the FBI and the Attorney General to share certain criminal history data with the INS and the State Department to improve visa decision making.

The most troubling provisions are the expanded grounds for deportation and exclusion, and the new mandatory detention procedure.

A. THE ADMINISTRATION BILL IMPOSES GUILT BY ASSOCIATION

The term "terrorism" has the capacity to stop debate. Everyone opposes terrorism, which is commonly understood to describe premeditated, politically-motivated violence directed at noncombatants. *See* 22 U.S.C. §2656f(d)(2) (defining terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents").

The INA, however, defines "terrorist activity" much more broadly, and under the Administration bill would define it beyond any common understanding of the term. Under current law, the INA defines "terrorist activity" to include any use or threat to use an "explosive or firearm (other than for mere personal monetary gain) with intent to endanger ... the safety of one or more individuals or to cause substantial damage to property." 8 U.S.C. §1182(a)(3)(B)(ii). Under the Administration bill, this would be expanded to include the use or threat to use any "explosive, firearm or other weapon or dangerous device" with the intent to endanger person or property. Section 201(a)(1)(B)(ii). This definition encompasses a domestic disturbance in which one party picks up a knife, a barroom brawl in which one party threatens another with a broken beer bottle, and a demonstration in which a rock is thrown at another person. It would also apply to any armed struggle in a civil war, even against regimes that we consider totalitarian, dictatorial, or genocidal. Under this definition, all freedom fighters are terrorists.[2]

The PATRIOT Act would define "terrorist activity" even more broadly, to include the use of "any object" with intent to endanger person or property. Under this bill, a demonstrator who threw a rock during a political demonstration would be treated as a "terrorist."

The point is not that such routine acts of violence are acceptable, or that armed struggle is generally permissible. But to call virtually every crime of violence "terrorism" is to trivialize the term. And because so much else in the Administration bill and the PATRIOT Act turns on "terrorist activity," it is critical to keep in mind the stunning overbreadth of this definition. Government action that might seem reasonable vis-a-vis a hijacker may not be justified vis-a-vis an immigrant who found himself in a bar fight, threw a rock during a demonstration, or who sent humanitarian aid to an organization involved in civil war. Yet the Administration bill draws no distinction between the hijacker, the humanitarian, the political demonstrator, and the barroom brawler.

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[2] In his testimony, Douglas Kmiec defends this expansion by erroneously stating that under current law, "an alien is inadmissible and deportable for engaging in terrorist activity only when the alien has usied explosives or fairares." Kmiec Statement at 7. Therefore, he argues, the change is needed to encompass attacks like those of September 11. That is plainly wrong. In its current from 8 U.S.C. 182(a)(3)(B)(ii) already defines "terrorist activity" to include, among other things, "highjacking or sabotage of any conveyance (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained," "assassination,"the use of any biological, chemical, or nuclear weapon, *and* the use or threat to use any explosive or firearm against person or property (other than for mere personal monetary again). Thus, no rewriting of the act is required to reach the conduct of September 11.

The breadth of "terrorist activity" is expanded still further by the Administration's proposed redefinition of "engage in terrorist activity." Under current law, that term is defined to include engaging in or supporting terrorist activity in any way. 8 U.S.C. § 1182(a)(3)(B)(iii). The Administration proposes to expand it to include any associational activity in support of a "terrorist organization." Section 201(a)(1)(C). And because the INS has argued that a terrorist organization is any group that has ever engaged in terrorist activity, as defined in the INA, irrespective of any lawful activities that the group engages in, this definition would potentially reach any group that ever used or threatened to use a "firearm or other weapon" against person or property.[3]

The Administration's bill contains no requirement that the alien's support have any connection whatsoever to terrorist activity. Thus, an alien who sent coloring books to a day-care center run by an organization that was ever involved in armed struggle would appear to be deportable as a terrorist, even if she could show that the coloring books were used only by 13-year olds. Indeed, the law apparently extends even to those who seek to support a group in the interest of countering terrorism. Thus, an immigrant who offered his services in peace negotiating to the IRA in the hope of furthering the peace process in Great Britain and forestalling further violence would appear to be deportable as a terrorist.

The bill also contains no requirement that the organization's use of violence be contemporaneous with the aid provided. An alien would appear to be deportable as a terrorist for making a donation to the African National Congress today, because fifteen years ago it used military as well as peaceful means to oppose apartheid.

And unlike the 1996 statute barring funding to designated foreign terrorist groups, the Administration bill does not distinguish between foreign and domestic organizations. Thus, immigrants would appear to be deportable as terrorists for paying dues to an American pro-life group or environmental organization that ever in its past used or threatened to use a weapon against person or property.

The net effect of the Administration's expansion of the definition of "engage in terrorist activity" and "terrorist activity" is to make a substantial amount of wholly innocent, nonviolent associational conduct a deportable offense. By severing any tie between the support provided and terrorist activity of any kind, the bill indulges in guilt by association. Douglas Kmiec disputes this assertion in his testimony, but in doing so refers not to the Administration's proposal, but to the PATRIOT Act. Kmiec Statement at 7. Even as to the PATRIOT Act, however, Professor Kmiec is wrong.

The PATRIOT Act seeks to strike a compromise on the issue of guilt by association. It gives the Administration what it seeks—the power to impose guilt by association—for support of any group designated as a foreign terrorist organization by the Secretary of State under 8 U.S.C. § 1189. An alien who sends humanitarian aid to a designated foreign terrorist group would be deportable, without more. But for those groups that are not designated, the bill requires a nexus to terrorist activity: the alien would be deportable only if he provided support to a non-designated group in circumstances in which he knew, or reasonably should have known, that his support was furthering terrorist activity. Thus, for designated groups, the PATRIOT Act permits guilt by association, but for non-designated groups, the PATRIOT Act retains the existing requirement that the INS show a nexus between the alien's act of support and some terrorist activity. The compromise reflected in the PATRIOT Act thus properly eliminates guilt by association for non-designated groups, but expressly authorizes guilt by association for any organization designated by the Secretary of State under 8 U.S.C. § 1189.

In my view, the principle that people should be held responsible for their own individual conduct, and not for the wrongdoing of those with whom they are merely associated, brooks no compromise. Guilt by association, the Supreme Court has ruled, violates the First and the Fifth Amendments.[4] It violates the First Amend-

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[3] In the Administration draft circulated Wednesday, September 19, terrorist organization was expressly defined to include any group that has ever engaged in or provided material support to a terrorist activity, irrespective of any other fully lawful activities that the group may engage in. In the revised draft circulated Thursday, September 20, the bill deleted the definition of terrorist organization, but still made any support of a terrorist organization a deportable offense. This is even worse from a notice perspective, as it makes aliens deportable for providing support to an entity that is underfined. In litigation, the INS has argued that the term "terrorist organization" means any group that has ever committed "terrorist activity." as the term is defined in the INA.

[4] The First and Fifth amendments apply to citizens and aliens residin in the United States. *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953). Mr. Kmiec suggest that this is wrong because the First and Fifth Amendments do not extend to aliens seeking entry from abroad. Kmiec Statement at 8. But of course such aliens are not residing in the United States. The Su-

ment because people have a right to associate with groups that have lawful and unlawful ends. Accordingly, the Court has ruled that one can be held responsible for one's associational ties to a group only if the government proves "specific intent" to further the group's unlawful ends. *United States* v. *Robel*, 389 U.S. 258, 262 (1967).

Guilt by association also violates the Fifth Amendment, because "in our jurisprudence guilt is personal." *Scales* v. *United States*, 367 U.S. 203 (1961). To hold an alien responsible for the military acts of the ANC fifteen years ago because he offers a donation today, or for providing peace negotiating training to the IRA, violates that principle. Without some connection between the alien's support and terrorist activity, the Constitution is violated. Douglas Kmiec argues that the guilt by association cases "deal with domestic civil rights." Kmiec Statement at 7.In fact, this principle was developed with respect to association with the Communist Party, an organization that Congress found to be, and the Supreme Court accepted as, a foreign-dominated organization that used sabotage and terrorism for the purpose of overthrowing the United States by force and violence. Yet even as it accepted those findings as to the Communist Party, the Court held that guilt by association was not permissible.

The guilt by association provisions of the Administration bill also suffer from tremendous notice problems. In the most recent draft, "terrorist organization" is wholly undefined, yet an alien can lose his right to remain in this country for supporting such an undefined entity. Is a terrorist organization one that engages exclusively in terrorism, primarily in terrorism, engages in terrorism now, or ever engaged in terrorism? The definition proffered in the Administration's Wednesday draft, and argued for by the INS in litigation, does not solve the notice problem, because it is so broad that it encompasses literally thousands of groups that ever used or threatened to use a weapon. Any alien who sought to provide humanitarian aid to any group would have to conduct an extensive investigation to ensure that neither the organization nor any subgroup of it ever used or threatened to use a weapon.

Congress repudiated guilt by association in 1990 when it repealed the McCarran-Walter Act provisions of the INA, which made proscribed association a deportable offense, and had long been criticized as being inconsistent with our commitments to political freedom. In 1989, a federal district court declared the McCarran-Walter Act provisions 1unconstitutional. *American-Arab Anti-Discrimination Comm.* v. *Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989), *rev'd in part and aff'd in part on other grounds*, 970 F.2d 501 (9th Cir. 1991). In 1990, Congress repealed those provisions. Yet the Administration would resurrect this long-rejected and unconstitutional philosophy.

B. THE ADMINISTRATION'S BILL WOULD APPLY ITS EXPANDED GROUNDS FORDEPORTATION RETROACTIVELY, SO THAT ALIENS WOULD BE DEPORTED FOR CONDUCT FULLY LAWFUL AT THE TIME THEY ENGAGED IN IT

The expansive definitions of "terrorist activity" and "engage in terrorist activity" detailed above are exacerbated by the fact that they apply retroactively, to conduct engaged in before the effective date of the Act. Since the principal effect of the Administration's new definitions is to render deportable conduct that is now wholly lawful, this raises serious problems of fundamental fairness.

As noted above, aliens are currently deportable for engaging in or supporting terrorist activity. However, the new law would add as new grounds of deportation wholly innocent and nonviolent associational support of political organizations that have at some time used a weapon. activity. Even to apply that ground prospectively raises substantial First and Fifth Amendment concerns, as noted above. But to apply it retroactively is grossly unfair.

Moreover, retroactive application would serve no security purpose whatsoever. Since under current law any alien supporting terrorist activity is already deportable, the only aliens who would be affected by the bill's retroactive application would be those who were not supporting terrorist activity — the immigrant who donated to the peaceful anti-apartheid activities of the ANC, or who provided peacemaking training to the IRA, or who made a charitable donation of his time or money

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preme Court has long distinguished between aliens are not residing in the United States. The Supreme Court has long distinguished between aliens seeking entry from outside our borders, who have no constitutional protections, and aliens here, whether here legally or illegally, who are protected by the First and Fifth AMendments to the Constitution. The Court reiterated this basic point, apparently missed by Mr. Kmiec, as recently as last term, in *Zsadvydas* v, *Davis*, 121 S. Ct. 2491, 2500 (2001) ("once an alien enters the country, the legal circumstance changes, for the due process here is lawful, unlawful, temporary, or permanent." The Supreme Court could not have been any clearer in *Colding*, in which it stated that neither First or Fifth Amendments "acknowledges any distinction" between citizens and aliens residing here.

to the lawful activities of an environmental or pro-life group that once engaged in violence. There is simply no justification for retroactively imposing on such conduct — fully lawful today — the penalty of deportation.

The PATRIOT Act largely solves the retroactivity problem, at least with respect to the guilt by association provisions, by limiting its newly expanded grounds of deportation for support of designated terrorist organizations to support provided after the designations were made. Since the designation already triggers a criminal penalty under current law, most aliens affected by this provision even for pre-Act conduct would not be able to claim that they were being deported for conduct that was legal when they engaged in it. However, the PATRIOT Act would present some retroactivity problems. Under the existing criminal provisions for material support to terrorist organizations, it is lawful to send medicine or religious materials to a designated group. 18 U.S.C. § 2339A. Yet the PATRIOT Act would make such conduct, even conduct engaged in before the PATRIOT Act took effect, a deportable offense. There is no warrant for deporting people for providing humanitarian aid at a time when it was fully legal to do so.

C. THE MANDATORY DETENTION PROVISION SECTION VIOLATES DUE PROCESS BY AUTHORIZING INDEFINITE UNILATERAL EXECUTIVE DETENTION IRRESPECTIVE OFWHETHER THE ALIEN CAN BE DEPORTED

The Administration bill would amend current INS detention authority to provide for "mandatory detention" of aliens certified by the Attorney General as persons who may "commit, further, or facilitate acts described in sections 237(a)(4)(A)(I), (A)(iii), or (B), or engage in any other activity that endangers the national security of the United States." Section 202(1)(e)(3). Such persons would be detained indefinitely, even if they are granted relief from removal, and therefore have a legal right to remain here. This provision would authorize the INS to detain persons whom it has no authority to deport, and without even instituting deportation proceedings against them, simply on an executive determination that there is "reason to believe" that the alien "may commit" a "terrorist activity."

To appreciate the extraordinary breadth of this unprecedented power, one must recall the expansive definition of "terrorist activity" and "engage in terrorist activity" noted above. This bill would mandate detention of any alien who the INS has "reason to believe" may provide humanitarian aid to the African National Congress, peace training to the IRA, or might get into a domestic dispute or barroom brawl. There is surely no warrant for preventive detention of such people, much less mandatory detention on a "reason to believe" standard. Mr. Kmiec, defending the provision, suggests that these examples are unlikely to arise. But the point is that any provision so broad as to permit such applications is in no way narrowly tailored to addressing true terrorist threats.

Current law is sufficient to meet the country's needs in fighting terrorism. The INS is authorized to detain without bond any alien in a removal proceeding who poses a threat to national security or a risk of flight. It routinely does so. It also has authority, as illustrated in recent weeks, to detain aliens without charges for up to 48 hours, and in extraordinary circumstances, for a reasonable period of time.

This provision raises four basic concerns. First, it is plainly unconstitutional, because it mandates detention of persons who pose no threat to national security or risk of flight. If the Attorney General certifies that an individual may provide humanitarian support to a group that has engaged in a civil war, for example, the person is subject to mandatory detention, without any requirement that the alien currently poses a threat to national security or risk of flight.

The mandatory detention provision is a form of preventive detention prior to trial. But the Supreme Court has held that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States* v. *Salerno*, 481 U.S. 739, 755 (1987). Preventive detention is constitutional only in very limited circumstances, where there is a demonstrated need for the detention—because of current dangerousness or risk of flight—and only where there are adequate procedural safeguards. Salerno, 481 U.S. at 746 (upholding preventive detention only where there is a showing of threat to others or risk of flight, where the detention is limited in time, and adequate procedural safeguards are provided); *Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) (civil commitment constitutional only where individual has a harm-threatening mental illness, and adequate procedural protections are provided); *Zadvydas* v. *Davis*, 121 S., Ct. 2491, 2498–99 (2001) (explaining constitutional limits on preventive detention, and interpreting immigration statute not to permit indefinite detention of deportable aliens). Where there is no showing that the alien poses a threat to national security or a risk of flight, there

is no justification whatsoever for detention, and any such detention would violate substantive due process.

Second, the detention authority proposed would allow the INS to detain aliens indefinitely, even where they have prevailed in their removal proceedings. This, too, is patently unconstitutional. Once an alien has prevailed in his removal proceeding, and has been granted relief from removal, he has a legal right to remain here. Yet the Administration proposal would provide that even aliens granted relief from removal would still be detained.[5] At that point, however, the INS has no legitimate basis for detaining the individual. The INS's authority to detain is only incident to its removal authority. If it cannot remove an individual, it has no basis for detaining him. *Zadvydas* v. *INS*, 121 S. Ct. 2491 (holding that INS could not detain indefinitely even aliens ruled deportable where there was no reasonable likelihood that they could be deported because no country would take them).[6]

Third, the standard for detention is vague and insufficiently demanding, and raises serious constitutional concerns. It is important to keep in mind that the bill proposes to authorize mandatory and potentially indefinite detention. That is a far more severe deprivation of liberty than holding a person for interrogation or trial. Yet the INS has in litigation argued that "reason to believe" is essentially equivalent to the "reasonable suspicion" required for a brief stop and frisk under the Fourth Amendment.The Constitution would not permit the INS to detain an alien indefinitely on mere "reasonable suspicion," a standard which does not even authorize a custodial arrest in criminal law enforcement.

Fourth, and most importantly, it is critical to the constitutionality of any executive detention provision that the person detained have a meaningful opportunity to contest his detention both administratively and in court. *INS* v. *St. Cyr*, 121 S. Ct. 2271 (2001). I read the judicial review provision as authorizing judicial review of the evidentiary basis for detention, and as authorizing the reviewing court to order release if the evidence does not support the Attorney General's determination that the alien poses a current threat to national security. In any event, such review would be constitutionally required: aliens may not be deprived of their liberty without notice of the basis for the detention and a meaningful opportunity to confront and rebut the evidence against them. *See, e.g., Landon* v. *Plasencia*, 459 U.S. 21, 34 (1982); *Kwong Hai Chew* v. *Colding*, 344 U.S. 590 (1953); *American-Arab Anti-Discrimination Comm.* v. *Reno*, 70 F.3d 1045 (9th Cir. 1995), *Rafeedie* v. *INS*, 880 F.2d 506 (D.C. Cir. 1989); *Al Najjar* v. *Reno*, 97 F. Supp.2d 1329 (S.D. Fla. 2000); *Kiareldeen* v. *Reno*, 71 F. Supp.2d 402 (D.N.J. 1999). Unilateral executive detention knows no place in American law.

The PATRIOT Act's mandatory detention provision share many of the above flaws. Most problematically, it, too, authorizes preventive detention without any showing that an alien poses any current danger to national security or a risk of flight. It only requires the Attorney General to certify that an alien "is described" in various deportation or exclusion provisions. These include aliens who the Attorney General believes may be mere members of designated foreign terrorist groups, and any alien involved in a domestic dispute or a barroom brawl in which a weapon or other object was used with intent to endanger person or property. Even if such aliens pose no threat to others or risk of flight, they are subject to mandatory detention.

In addition, like the Administration's proposal, the PATRIOT Act permits indefinite detention. The PATRIOT Act adds a requirement that the government file immigration or criminal charges against an alien mandatorily detained within 7 days, but that is a largely irrelevant protection, because the provision authorizes indefinite detention even of those aliens who prevail in their deportation proceedings. The requirement that charges be filed means nothing if the resolution of those charges in the alien's favor has no effect on the detention.

The judicial review provision of the PATRIOT Act marks an improvement on the Administration proposal by clarifying explicitly that judicial review would include review of the merits of the Attorney General's certification decision, and by barring

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[5] In many instances, an alien who poses a threat to national security will not be eligible for discretionary relief.

[6] While the Court in *Zadvydas* left undecided the question of indefinite detention of a deportable alien where applied "narrowly to 'a small segment of particularly dangerous individuals,' say suspected terrorists," 121 S. Ct. at 2499, the Court did not decide that such detention would be permissible since the question was not presented. Moreover, the Administration's proposed definition of "terrorist activity" would not be limited to a narrow, "small segment of particularly dangerous individuals," as te Court in *Zadvydas* contemplated, but to garden variety criminals, barroom brawles, and those who have supported no violent activity whatsoever, but provided humanitarian support to the Afican National Congress. It begs credulity to characterize such an open-ended authority as limited to a "small segment of particularly dangerous individuals."

delegation below the INS Commissioner of the certification decision. But like the Administration provision, it affords the alien no administrative opportunity to defend himself, and therefore violates due process.

D. THE BILL RESURRECTS IDEOLOGICAL EXCLUSION, BARRING ENTRY TO ALIENS BASED ON PURE SPEECH

The bill would also amend the grounds of inadmissibility. These grounds would apply not only to aliens seeking to enter the country for the first time, but also to aliens living here who seek to apply for various immigration benefits, such as adjustment of status to permanent resident, and to permanent residents seeking to enter the country after a trip abroad.

The bill expands current law by excluding aliens who "endorse or espouse terrorist activity," or who "persuade others to support terrorist activity or a terrorist organization," in ways that the Secretary of State determines undermine U.S. efforts to combat terrorism. Section 201(a)(1). It also excludes aliens who are representatives of groups that "endorse acts of terrorist activity" in ways that similarly undermine U.S. efforts to combat terrorism.

Excluding people for their ideas is flatly contrary to the spirit of freedom for which the United States stands. It was for that reason that Congress repealed all such grounds in the INA in 1990, after years of embarrassing visa denials for political reasons.

Moreover, because of the breadth of the definitions of "terrorist activity" and "terrorist organizations," this authority would empower the government to deny entry to any alien who advocated support for the ANC, for the contras during the war against the Sandinistas, or for opposition forces in Afghanistan and Iran today. Because all of these groups have used force or violence, they would be terrorist organizations, and anyone who urged people to support them would be excludable on the Secretary of State's say-so.

The PATRIOT Act shares this problem, and goes further, by rendering aliens deportable for their speech. However, it qualifies the deportation provisions with the requirement that the speech be intended and likely to promote or incite imminent lawless action, the constitutional minimum required before speech advocating illegal conduct can be penalized. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969).

CONCLUSION

In responding to terrorism, we must ensure that our responses are measuredand balanced. Is it a measured response to terrorism to make deportable anyone who provides humanitarian aid to the African National Congress today? Is it measured to deport aliens for donating their time to a pro-life group that once engaged in an act of violence but no longer does so? Is it measured to deport an immigrant who sends human rights pamphlets to an organization fighting a civil war? Is it measured to label any domestic dispute or barroom fight with a weapon an act of terrorism? Is it measured to subject anyone who might engage in such activity subject to mandatory detention? Is it measured to restore exclusion for ideas? Is it measured to make aliens deportable for peaceful conduct fully lawful at the time they engaged in it?

I submit that the Administration's proposal falls short in all of these respects. The overbreadth of the bill reflects the overreaction that we have often indulged in when threatened. The expansive authorities that the Administration bill grants, moreover, are not likely to make us safer. To the contrary, by penalizing even wholly lawful, nonviolent, and counterterrorist associational activity, we are likely to drive such activity underground, to encourage extremists, and to make the communities that will inevitably be targeted by such broad-brush measures disinclined to cooperate with law enforcement. As Justice Louis Brandeis wrote nearly 75 years ago, the Framers of our Constitution knew "that fear breeds repression; that repression breeds hate; and that hate menaces stable government." *Whitney* v. *California*, 274 U.S. 357, 375 (1927). In other words, freedom and security need not necessarily be traded off against one another; maintaining our freedoms is itself critical to maintaining our security.

The Administration's bill fails to live up to the very commitments to freedom that the President has said that we are fighting for. As the Supreme Court wrote in 1967, declaring invalid an anti-Communist law, "'It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile." *United States* v. *Robel*, 389 U.S. 258, 264 (1967).

Chairman FEINGOLD. Thank you, Professor. I thank all the witnesses.

We will now begin five-minute rounds of questions and I will begin with some questions for Professor Cole.

You have just been talking about the mandatory detention provisions of the administration's proposed anti-terrorism bill. Attorney General Ashcroft asserted at our hearing last week that he only sought authority to detain individuals who were out of status or otherwise deportable.

Can you tell us why you believe that original proposal actually went a lot farther than that?

Mr. COLE. Well, first of all, he already has that authority, Senator Feingold. Under current law, any alien who is out of status can be put into deportation proceedings, can be denied bond if there is any basis to believe that he poses a risk to national security or a risk of flight, and the INS does it all the time. So if that is all he is asking for, he doesn't need to ask for it. He already has that authority.

What he is asking for is the authority to detain people indefinitely, even if they win in their deportation proceedings. Under current law, he can only hold them as long as the deportation process is going on. Once the alien prevails and there are no appeals left, the alien has to be freed.

But under the provision that they propose, even an alien granted relief from removal—say, an alien who is eligible for asylum and granted asylum, or is eligible for adjustment of status and is granted adjustment of status and has the right to remain here permanently—would be subject to indefinite detention.

Secondly, what he is seeking goes further than current law because under current law he does have to make a showing that there is a threat to national security or a risk of flight. Under his provision and under the House bill, no such showing is required, and I know of no precedent whatsoever for an executive branch official to be able to lock somebody up without making a showing that the person poses some threat. At a minimum, we have to show that the person poses some threat, but that is not what is required under either provision.

Chairman FEINGOLD. Thank you. I think you already alluded to the apparent House compromise on the mandatory detention. But the compromise, as has been said by the Attorney General, would require the Attorney General to file charges of an immigration violation against the immigrant within seven days of detention, or require the Attorney General to release the immigrant if charges are not filed.

Could you again detail what I thought you said, which is that you do not believe that is satisfactory?

Mr. COLE. That certainly doesn't solve the problem. Even my colleague on the panel here, Dean Kmiec, acknowledges that there are very serious constitutional problems with authorizing any detention without charges beyond 48 hours. The Supreme Court has said 48 hours is the limit, except in absolutely extraordinary circumstances.

Yet, the House compromise would give the Attorney General the authority to hold without charges for seven days on a mere show-

ing that an alien was a member of a group, not that the alien did anything wrong, not that the alien engaged in any terrorist activity, but merely that is a member of a group. That raises serious constitutional concerns.

The second problem is that the requirement of filing charges within seven days is really meaningless if the result of the proceeding in which the charges are filed doesn't affect the authority to detain. Yes, you have to file charges. Well, of course, the Attorney General is going to be able to file charges. If he has reasonable grounds to believe that an alien is described in the deportation provisions, he will be able to file charges under those provisions.

But the statute provides he can hold the person even if the person wins in those deportation proceedings. So it is indefinite detention. It has been erroneously reported in the press—I am not clear why—as having resolved that problem.

But I think the important point is that the Attorney General today has the authority to detain any immigrant who has any kind of status violation and poses a threat to national security and a risk of flight. That is not questioned, and there has been no showing that that is insufficient to meet our concerns about detention.

Chairman FEINGOLD. I appreciate that clarification.

At our hearing last week, Senator Kennedy asked Attorney General Ashcroft about the ability of immigrants to seek judicial review of the Attorney General's decision to detain them indefinitely. The Attorney General responded by saying that seeking habeas relief is sufficient. He said, "Habeas can be a very broad remedy and you can allege virtually anything in a petition. You can allege that the Attorney General either relied on false documents or bad information, or made an arbitrary rather than a discretionary decision."

Do you agree that a petition for habeas relief is sufficient to address concerns about judicial review?

Mr. COLE. Well, I think a petition for habeas corpus that permits the court to address the objective basis for the detention and to authorize release of any alien who does not present a danger or a risk of flight would be sufficient. But, unfortunately, that is not authorized under the House bill.

Under the House bill, there is judicial review in habeas of the Attorney General's certification. But, again, all the Attorney General has to certify is that he has reasonable grounds to believe that an individual has conducted terrorist activities, so broadly defined to include, as I said, virtually every violent crime.

We don't allow mandatory, absolute detention of every citizen accused of a violent crime, only those whom we find either pose a danger to others or are a risk of flight. That is a standard we have lived with for 200 years. We have lived with it on the criminal side, we have lived with it on the immigration side. It is constitutionally compelled. Judicial review doesn't really solve the problem if the standard for detention doesn't include a requirement of current dangerousness or risk of flight.

Chairman FEINGOLD. Thank you, Professor.

We will now turn to Senator Sessions for his first round of questions.

Senator SESSIONS. Thank you, Mr. Chairman.

Just briefly on the immigration circumstances, maybe Professor McGinnis could help us here, but as I understand it, under the Constitution we have no requirement to admit anyone into the country. No one has a constitutional right to be admitted into the United States.

Is that correct?

Mr. MCGINNIS. That is what I understand, Senator.

Senator SESSIONS. Therefore, it would flow, it seems to me, that as we do in normal criminal law, if you have an ability to put someone in jail for a crime, you have the ability to let them out of jail on condition during the term of that offense. So it seems to me that we could allow persons into the United States under restrictions. In fact, we do that, do we not?

Mr. MCGINNIS. I understand that, Senator, yes.

Senator SESSIONS. So I guess my view of it is that this isn't a normal constitutional circumstance where we are dealing with an American citizens. Persons are here by permission, and if they are here by permission and we have a right to place constraints on them and requirements on them, it seems to me that a wise nation would try to craft laws that would say that those persons who are here should not pose a threat to the good order, peace and dignity of the people of the United States.

Could you comment on that?

Mr. MCGINNIS. Yes, Senator. If I might just add to that, I think it is very important to understand that it has been well-known that if, for instance, a country attacked us that we have in the past and from the very early Congresses had statutes permitting the detention of aliens of that country because they owe loyalty to our enemy rather than to the United States. So it is just very clear that under those conditions, we can detain people indefinitely until we deport those aliens.

What we face today is a different kind of war. We are not being attacked by some nation state. We are being attacked by what I would call an irregular militia or a group of guerrillas. We certainly don't want to detain willy-nilly everyone who could be from a nation that is putting forth these guerrillas against us, and that is why we need a finer-grained authority that permits the Attorney General to detain people—as I say, I don't want to get into exactly how long and the details of this, but to detain aliens for some period of time if they are a threat to national security.

So we are doing what is common in the common law. We are translating the law to deal with a new condition, a totally different kind of war.

Senator SESSIONS. Well, I would agree with that. As a prosecutor, having wrestled with these matters, if you are dealing with a bank embezzler, or even a bank robber for that matter, the requirements are pretty stringent for surveillance and/or detaining one of those individuals. But if you are dealing with an alien who you have some evidence less, let's say, than proof beyond a reasonable doubt that they are a terrorist, what should a wise nation do? That is a question that I have wrestled with.

Mr. KMIEC. Senator, if I might add, this is a topic that has not been totally invisible to the Supreme Court of the United States. In this last term, they considered the statute which this Congress

has enacted which authorizes, among other things, post-removal detention, and the issue was how long.

Now, in many cases the INS has difficulty finding countries who are willing to take people who have committed felonies in this country and who are national security risks and who are out of status in terms of immigration. That is no surprise that a welcome mat isn't out in every country around the world.

It is very important to remember that in its most recent decision the Supreme Court said there was a reasonable time limit for how long you could hold someone after a removal proceeding. But they very explicitly said that we were not dealing with the circumstance, as Professor McGinnis just said, that we confront now. In fact, Justice Breyer articulated that we are not dealing with the circumstance of terrorism where the ability to hold an alien under those circumstances would be different.

So the Supreme Court has acknowledged what we all know and what was stated in your question, that immigration is an aspect of our sovereignty; it is an aspect of our foreign policy. For that reason, what this Congress provides by way of immigration law is the sum and substance of due process for those seeking admission to the country of the United States.

With regard to those who are already here and have some form of permanent residency, the Court's standards are a bit different, but they are not clearly of the same level as apply to American citizens. There is still a differentiation. It is not entirely clear where the Court draws the line between American citizens and aliens, but the one thing that is clear is that those who have been members of groups that have, for example, been involved in Nazi persecution have been removed from this country for that membership alone, without any showing that they were actively involved in the prison camp activities in terms of those Nazi atrocities.

So your question, I think, goes to the heart of the emergency situation and the differentiation between aliens who are here as our guests and American citizens.

Mr. HALPERIN. Senator, would you permit another comment on that for just a second?

Senator SESSIONS. Yes.

Mr. HALPERIN. As has already been hinted at, the Supreme Court has made it absolutely clear that the Constitution and the Bill of Rights protects people who are in this country whether they are citizens or not.

Senator SESSIONS. It protects them, but it does not guarantee them automatic citizenship.

Mr. HALPERIN. It doesn't give them citizenship, but it gives them constitutional rights. And if the Government wants to move to deport them, it obviously has a broader basis to do that, but it has to have the nexus. I think what Professor Cole is saying is if this provision said you can detail people who you believe were active members or active supporters or knowing supporters of a terrorist organization that had planned or engaged in terrorist acts in the United States and you could hold that person until you deported them, nobody would object to that. But that is not what the language says.

We sit here enacting legislation with one image in mind, and 20 years later, by a different administration with less respect for civil liberties, it gets used against a very different group of people who are not terrorists in a situation which nobody contemplated when you enacted the legislation.

Senator SESSIONS. Well, what about the situation where a person comes here and they have been active in a terrorist organization that has declared war on the United States and has executed war acts against the United States, and we did not know it when they came and we find out later?

Mr. HALPERIN. Then you lock them up and deport them.

Senator SESSIONS. On what basis?

Mr. HALPERIN. On the basis that they pose a threat to national security.

Senator SESSIONS. Well, the mere fact, Mr. Cole says, that they are a member of an organization is not proof that they are a threat to the United States.

Mr. HALPERIN. No. He said—

Mr. COLE. If I could respond—

Senator SESSIONS. In your comments to the Washington Post, you said today's terrorist is tomorrow's government, and that we have no right—

Chairman FEINGOLD. I will let Professor Cole respond to that and then that is past the time and we will go to Senator Durbin.

Senator SESSIONS. You also said that people have a right to support the lawful activity of any group they choose.

Mr. COLE. Right.

Senator SESSIONS. So what you are saying is just a member of the group and supporting the group is not a basis, as Mr. Halperin said, to remove somebody.

Mr. COLE. That is right, and the reason I say that is because the Supreme Court has said it time and time again, and it has said it with respect to the Communist Party, which this Congress had found was a foreign organization engaged in sabotage and terrorism directed at the overthrow of our country by force and violence.

Nonetheless, the Supreme Court said you cannot penalize people for their mere association with the Communist Party. Whether they are immigrants or citizens, the Court has said that that is not permissible.

To your specific question about someone who comes in who is a member of Al Quaeda working to engage in further attacks, that person could—

Senator SESSIONS. No, not working to engage, just a member. We have no proof that they are working to engage. That is the problem facing law enforcement. They are here, a member of a group, and we don't have the proof to arrest them for planning an attack, or we would arrest them.

Mr. COLE. Two responses to that. One is that the Constitution says that you cannot presume from mere membership, whether the person is an immigrant or a citizen, that that person is engaged in illegal activity.

Number two, it might be permissible—on the enemy alien analogy that Professor McGinnis has identified, it might be permissible

to target only members of Al Quaeda or whatever group it is that attacked us. But this bill does not do that. This bill says that any alien who is engaged in any minor crime of violence can be subject to mandatory detention without a finding of dangerousness.

So that is not enemy aliens. This is any alien who is engaged in a minor act of violence; also, any alien who provides humanitarian support to the IRA or the ANC. Those are not organizations that are attacking us.

Senator SESSIONS. I think you are over-reading that.

Chairman FEINGOLD. Professor Cole, thank you.

Senator Durbin?

Senator DURBIN. Thank you very much, Mr. Chairman.

I would like to just preface this by putting a little perspective on this. Prior to September 11, this committee had held hearings with the Federal Bureau of Investigation in which we asked some very hard questions about their activities and their infrastructure, and I think that the testimony was very clear that when it comes to the infrastructure to receive, evaluate, process and distribute information, the Federal Bureau of Investigation is not where it should be.

What we are debating today are changes in the law to provide additional information to the Federal Bureau of Investigation. There are many of us who think this is an important debate and that there are elements of their request that should be granted, but I want to go back to first principles here.

Before we expand the universe of information, we ought to ask the basic question as to whether or not the archaic computers and information systems currently at the Federal Bureau of Investigation are up to speed to fight this war. I think the answer is clear: they are not.

I am going to address the constitutional issues and I am glad we are making this the focus of the hearing, but I hope that this committee, and particularly the anti-terrorism bill, will look to this issue, too, because giving all of the opportunity for accumulating information to the FBI and no wherewithal to process it, evaluate it, share it and use it to defend America is, I think, at best, a useless gesture.

Mr. Kris, I have read the letter which you have brought here, and it was very clear to me that the Department of Justice is trying to analyze the court cases when it comes to the FISA investigations as opposed to the Fourth Amendment.

The thing that I find interesting is that the courts have said, I think, consistently we are going to draw a pretty clear line between domestic security and foreign intelligence. Those are two different worlds, and when it comes to domestic security, that is where we are comfortable. When it comes to establishing probable cause for the commission of crime, that is where the courts can help. But when it comes to foreign intelligence, this is a new world; this is the executive branch. There are areas there where we are not altogether certain that we can make the fine distinctions that are important to draw the line.

Now, I think that has been the basis of the law and the creation for these FISA authorities, but I will also tell you that I think your concluding argument from the Department of Justice here, and I

am going to quote a couple of lines from it, really tells us what we are up against as a Nation and as a committee evaluating this.

It says in this letter which has been sent by Assistant Attorney General Dan Bryant, "September 11th's events demonstrate that the fine distinction between foreign intelligence-gathering and domestic law enforcement has broken down. Terrorists supported by foreign powers or interests lived in the U.S. for a substantial period of time, received training and killed thousands of civilians by hijacking civilian airlines. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component which may involve domestic law enforcement."

What I read from this is that this line of demarkation, according to the Department of Justice, is gone. And if that line is gone because of the nature of the threat against the United States, then I think we have a larger question than we are even addressing today, and that is whether the body of law that has brought us to this point is sufficient.

If we accept that premise, if that is where we are starting, that we can no longer draw a line between foreign intelligence and domestic security, and if we are going to protect America we have to err on the side of assuming everything is foreign intelligence and the Fourth Amendment does not apply, then I think things have changed dramatically.

Mr. Kris, would you respond?

Mr. KRIS. Yes. I don't think it is our contention that foreign intelligence includes everything. None of our provisions would seek to change the definition of the term "foreign intelligence information" in the bill or in FISA right now.

I think what you are putting your finger on is a breakdown in the rigid distinctions that used to exist. In the Cold War era, we did law enforcement surveillance on the Mafia or on drug dealers and we did counterintelligence surveillance on countries that were spying on us, and there was a fairly clear distinction between those two worlds. With the increase in terrorism and the expansion of some of our criminal laws as well, I think there is an increasing coming together of those worlds.

The question, I think, that is presented by our amendment to FISA with respect to purpose is how much foreign intelligence purpose is required to keep us under the foreign intelligence constitutional standards and not under the ordinary criminal standards.

Senator DURBIN. May I just say at this point, as I understand it, under the old standard that we are addressing you had to say to establish this FISA eavesdropping or surveillance that it was the purpose, the gathering of information for foreign intelligence.

Mr. KRIS. That is what the statute says currently.

Senator DURBIN. And the proposed amendment says "a purpose." Now, the courts have said once you get in pursuit of foreign intelligence information, you can develop information that leads to a criminal prosecution. They have acknowledged that fact. It may lead to that.

Mr. KRIS. Yes.

Senator DURBIN. But if you lower that standard at the start, at the threshold, and say that it just has to have some foreign intelligence connection or nexus and from that point forward you can go to criminal prosecution, what is left of the Fourth Amendment in these cases?

Mr. KRIS. Well, I think what our letter says and what the current—there is a lot of different legislation, I guess, that is on various tables, but the letter here reflects "a significant purpose," not just "a purpose." And our conclusion as reflected in the letter is that that is enough to satisfy the Fourth Amendment.

"A significant purpose," I think, is a meaningful standard. It would exclude an insignificant purpose. But what it also reflects is that in many of these cases, not in all of them, there will be law enforcement equities that are implicated by the activity that is under surveillance.

We need to be able to coordinate between our law enforcement authority elements in the Government and our intelligence in the Government so that we can have a coherent, cohesive response to an attack like the one we experienced on September 11 and not end up in a situation where we have a splintered, fragmented approach and the left hand and the right hand don't know what each other is doing.

Senator DURBIN. Mr. Chairman, I am sorry that the others can't respond because I would like to hear their response. My time is up. I would like to make one point in closing.

I sat down last week with a man who works for the Department of Justice who has spent the last several years prosecuting Osama bin Laden terrorists. He probably knows more about the subject than almost anyone. I said to him, what is the one thing you need to be more effective in your prosection? He said we have to look at this FISA provision; we have to find a way to deal with the line that has been created that doesn't work when it comes to terrorism.

That is the struggle I am facing in my mind here trying to resolve his need to stop terrorism and our need to protect these constitutional rights. I hope we will have a chance for another round of questions.

Chairman FEINGOLD. Thank you, Senator Durbin.

Let me just allow Mr. Halperin and Mr. Berman to quickly respond to that, and then we will go to the second round.

Mr. HALPERIN. Can I just make three quick points? One is we now have had an admission by the Department of Justice that it is no longer prepared to defend the constitutionality of its original proposal which it asked the Congress to pass in five days. I urge you to underline the need to read the rest of it very carefully because there are things in there, as well, that, on being pressured, they will not be able to defend.

Second, the Justice Department says that it is not trying to change the definition of foreign intelligence information, but it doesn't use it in the bill. This bill would be immensely improved if everywhere the phrase "foreign intelligence information" appears, you put a comma, "as defined in FISA," comma. I urge you, based on what was said, to do that.

Third, I think we are in a new world, and I speak here only for myself, in dealing with foreign terrorism that operates in the United States exactly as described in the letter. But the changes we make to deal with that ought to be limited to dealing with terrorist organizations that operate abroad and in the United States.

So if you went through the bill and everywhere you talked about information-sharing or holding aliens in various situations, if you limit it in this case to information relating to terrorist groups that operate in the United States and abroad, the information-sharing and all the provisions, this bill would be much less dangerous and much less troubling to all of us.

The problem is the Justice Department is trying to get that authority not just for this disaster that we have in our minds and this very real threat, but for all counterintelligence. We need to remember that a different Justice Department thought the whole anti-war movement was being directed from Hanoi and therefore was a foreign counterintelligence organization. Let's limit this and we will make it much better.

Chairman FEINGOLD. Thank you.

Mr. Berman, briefly, please.

Mr. BERMAN. It can be limited. We limit it to terrorism or we do the dual-tap authority and coordinate between the two branches, which the Senate Intelligence Committee recommended.

Finally, I think the real danger here is a catch–22. The constitutional issue will get raised, but it will get raised in a criminal prosecution where, if the Justice Department is wrong, there will be suppression of evidence and a terrorist may get off.

The problem with the innocent target of this expanded surveillance is that they may never know, because there is no notice, it goes on forever. And when they terminate it and say there are no grounds here, it never goes to them. So the violation of the Constitution has no remedy. That is why constitutional policy is important and that is why the Congress has a role here.

Chairman FEINGOLD. Thank you, Mr. Berman.

We will start a second round.

Back to Professor Cole, I have a question that does not relate directly this bill of the administration, but addresses the Justice Department's conduct in response to and in pursuit of the investigation of the events of September 11. Obviously, they have a very tough job to do.

News reports indicate that the Justice Department has detained more than 500 people, most of them Muslims and Arabs, since the September 11 attacks, but the Justice Department has not charged a single person with a crime related to the attacks. Again, I believe that the Attorney General and the FBI Director, Mr. Mueller, and the men and women at the Justice Department have worked incredibly hard and have for the most part conducted themselves in an exemplary fashion.

But some have raised concerns that innocent people have been unfairly targeted and detained during the course of this investigation. In response, Director Mueller has said that his agency is targeting people "based on predications that the individual may have information relating to the attacks."

Let me ask two questions in connection with that. First, do you believe that the FBI may be casting a net that is too wide and ensnaring innocent people in its grasp? Secondly, what do you believe can be done to ensure that innocent people are not unfairly targeted and detained?

Mr. COLE. Well, obviously I am not privy to the FBI's information with respect to each of these 500 people, so it is hard to make any kind of definitive judgment without that information.

I do think it is fair to assume that when 500 people have been locked up and none of them have been charged with a crime that many, and probably most of those people are entirely innocent of the crime. What law enforcement is doing is using the pretext of other offenses, sometimes minor traffic offenses, to lock them up for extended interrogation in custodial settings. I think that raises some questions of policy. I don't think it is illegal. Pretextual law enforcement is permitted.

That brings me to the second point, which is that the fact that the Government has this power, the fact that the Government can respond by going out and locking up 500 people without charging any of them with being involved with the crime illustrates how expansive our powers already are, and suggests that the kinds of expansions that the Government is seeking, particularly in treating people as guilty solely for their political associations, and then also authorizing indefinite detention of those people, are unnecessary.

Chairman FEINGOLD. Thank you, Professor.

Mr. Berman, Dean Kmiec writes in his testimony that the extension of trap and trace authority to the Internet poses no constitutional issue because the courts have previously held that pen register information is not subject to constitutional protection, and that if the proposed language is explicit that the content of the communication is not included.

You have talked about this some. Do you agree that the legislation is clear enough that it would not permit the Government to obtain content under this new authority, and would you specifically address whether the House bill provides adequate protection?

Mr. BERMAN. Yes. I think the Court has said in a pen register, where it is gathering dialed numbers, that does not pose a constitutional issue. But the pen register today, both its technology—the House and Senate both wrestled with Carnivore, the ability under a pen register to gather both the content and the transactional information off a switch in a computer network.

The language in the statute does not track that it is looking for IP addresses or the origin and destination, as the Attorney General testified before this committee. It adds a series of terms without explanation or legislative history, and we are dealing with a plain reading which talks about dialing, routing, addressing, signaling.

When we have a discussion with the Justice Department, they say "we don't want to include the subject line of e-mails," which is content. A whole message and a series of messages tell you the content. You understand this technology.

The initial URL may be an address, but then if you get beyond the initial URL because you are looking for the pornographic encrypted page—there have been reports that there may have been that kind of page on the Internet. Once you are scrolling through

those pages under a pen register statute, you are raising constitutional questions because you are collecting significant content.

The Justice Department comes back and says the section does say we don't want content. But when you discuss with them what do they mean by content, they say "what do you mean by content?" I think we need to clarify that in the statute.

Chairman FEINGOLD. Let me ask you another one concerning a matter that you raised, and I appreciate it, the computer trespass provision. It sort of reads to me that it could apply to a person who has used his work computer for personal purposes, in violation of his employer's computer use policies. Is that the case?

Mr. BERMAN. I think that that is a plain reading of the statute. Someone thinks that someone is using their computer time to engage in gambling. Does that mean that the FBI can be called in and given permission to collect all of the e-mail and the traffic on that computer at that address without getting a Title III warrant? I think it says that.

They say it only applies to denial of service attacks, where you have an emergency situation. We can draft emergency situation language for denial of service where something is happening at the computer and the ISP calls in the FBI and there is no time to get a warrant and collect that information. But it goes far beyond that. It says "any unauthorized use." Does that mean violating the terms of service?

The Justice Department has now, I believe, said, well, maybe terms of service don't count, or we can take that out. But since you go through a network, you may have no terms of service relationship with that ISP, and therefore they will give you permission to look at any funny business. That requires us to go back and say why can't they get a Title III warrant?

A last comment. One of the problems is they are talking about impediments, removing impediments. The Constitution and all of the procedures that we set up in these laws are impediments. We protect our civil liberties with impediments. It is judicial review, it is auditing, it is keeping track, it is having a justification. Those are impediments and it slows up the process.

I believe we need to have those impediments to protect our Constitution. It is a bureaucratic nightmare for law enforcement and I think we can reduce it by carefully crafting it, but we can't eliminate it because those impediments are what keeps us from being a police state.

Chairman FEINGOLD. Thank you very much, Mr. Berman. I appreciate the answer.

Senator Sessions?

Senator SESSIONS. I would yield to Senator Specter.

Chairman FEINGOLD. Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Senator Sessions, for yielding to me at this time. We are in the hearing room adjacent considering bio/chemical weapons and I am ranking on that subcommittee, but I wanted to come over here for a few minutes.

Chairman FEINGOLD. Thank you.

Senator SPECTER. I just learned that the subcommittee was holding this hearing, and have been pressing for hearings before the full committee because the full committee is going to have to act, and act very promptly. I have expressed my concern about the delays because there could be some intervening act which could be attributable to the lack of congressional action on the subject, and I believe that we have to be careful as we craft this legislation.

A week ago yesterday, Attorney General Ashcroft was in talking about the need for detention of aliens where there was a deportation process. But the bill that they had presented did not provide just for detention where there was detention, but it was broader. I expressed the view that the authority existed now, or if it didn't, we would give them that authority, but not the way the statute was drafted, which left it up to the Attorney General's discretion without any standards. Similarly, on the issue of the Foreign Intelligence Surveillance Act, the Attorney General testified that he only wanted content where there was a statement of probable cause, but that is not the way the bill worked.

Senator Hatch has scheduled a meeting of Republican Senators for this afternoon, as I understand it, to tell us what the bill is. Frankly, that concerns me because in the hearing we had a week ago yesterday the Attorney General testified for an hour and 15 minutes and the real technicians who were there—the Deputy Attorney General, the Assistant Attorney General, Criminal Division, and the Assistant Attorney General, Legal Counsel—just shuffled some papers back and forth on some of the precise points.

We have seen in past years a number of U.S. Supreme Court decisions invalidating acts of Congress because there has not been a sufficient deliberative process. The Supreme Court says they have the authority to declare acts of Congress unconstitutional when, in effect, they are not thought through.

Now, I have real questions about that on separation of powers, but they do have the last word, and if we do not have the deliberative process at work here—and I want to hear the specifics and I am about to ask you a question, Mr. Kris. We may have to do it in closed session.

Seven days is a protracted period of time, as the House calls for detention, and changing the Foreign Intelligence Surveillance Act to "a significant purpose" has a significant—pardon me for using that word—problem constitutionally. But maybe so, but maybe so, if we have a showing as to what you need on intelligence-gathering.

In this room, we had protracted hearings on Wen Ho Lee as to Attorney General Reno's declination of a FISA warrant, and the difference between that and probable cause and that whole range of technicalities. So it may be that, on a balancing test where this is the quintessential area, police power versus constitutional rights and a terrorist threat—everybody acknowledges the horrendous problem we face and this is a balancing matter, but we have to know the details.

Mr. Kris, what justification is there factually for changing the standards under the Foreign Intelligence Surveillance Act? Are you prepared to tell this subcommittee, and hopefully this committee, that there is intelligence data out there which can be gathered with

a lesser standard under FISA that you can't get on a probable cause statement which is important for national security?

Mr. KRIS. Well, consistent with my initial statement, I will try to answer your question as fully as I can. There may be a need to address it in a different forum.

Senator SPECTER. We are prepared to clear the room of even Mr. Berman and Professor McGinnis and Dr. Halperin and the whole works. We are prepared to clear the room or take you into the side room.

Mr. KRIS. I am at your disposal in that regard, but let me begin with what I can say openly, and that is that the "purpose" amendment that we are advancing—and "significant purpose" is the current language—I think is not so much designed to expand the kinds of information that we can obtain, but rather to ensure that when we get the information, we can coordinate properly between the intelligence side and the law enforcement side of the Government.

Senator SPECTER. Well, you want to make it available to law enforcement.

Mr. KRIS. Yes.

Senator SPECTER. That is a change. "The purpose" to "a significant purpose" is a big change.

Mr. KRIS. It is a change.

Senator SPECTER. But do you have a justification for it? Do you face today problems which you can say to the Congress warrant this expansion? If you do, I am prepared to give it to you if there is a constitutional basis to defend it later before the Court.

Mr. KRIS. Well, constitutionally, of course, we do have the letter that has come to you. As to the practical need for this, let me say what I can say here.

Senator SPECTER. The letter? It doesn't weigh very much in a Supreme Court argument.

Mr. KRIS. Well, the letter obviously has legal analysis in it that would be advanced in a brief if the issue were presented to a court.

Senator SPECTER. It is really more than a matter of legal analysis. It is a matter of a factual presentation as to what your specific factual needs are.

Mr. KRIS. And with respect to that, let me say sort of two things. First, I heard Senator Durbin earlier discuss the fact that he had met with Pat Fitzgerald, one of the UBL prosecutors from New York, and Mr. Fitzgerald explained to him and Senator Durbin recounted here the need for this.

There is also, of course, the GAO report, issued in July of 2001, commissioned by Senator Thompson, that says in the first two sentences, "Coordination between the FBI and the Criminal Division has been limited in those foreign counterintelligence cases where criminal activity is indicated and surveillance or searches under FISA may be employed. And a key factor inhibiting this coordination is the concern over how the FISA court or another Federal court might rule on the primary purpose of the surveillance or search in light of such coordination." The GAO is a public document and it goes on at length. There is also, of course, the AGRT report on the Wen Ho Lee case which the Congress has in its full and unclassified form which recounts this in some detail.

Senator SPECTER. Well, the red light is on and I will respect the red light, and I thank the subcommittee for letting me participate even though I am not on the subcommittee. I think this really, with all due respect, should have been at full committee because we all have to act on it right away.

Mr. Kris, I make a formal request of the Department through you to make available to subcommittee members, and I will be in attendance and I think others would be, in closed session, if necessary, and today promptly the specifics as to what is happening out there which leads you to conclude that you need a different standard under FISA to be available for the criminal prosecutors and what you need with respect to the detention.

If you can make a factual showing that can be defended constitutionally, I think the Congress is willing to do it. I even noticed Dr. Halperin and Mr. Berman nodding in the affirmative. You don't get their affirmative nods too often on an expansion of law enforcement powers.

Thank you very much, Senator Sessions. Thank you, Mr. Chairman.

Chairman FEINGOLD. Thank you, Senator Specter.

Let me just note that I agree with Senator Specter's concern that there should be a full committee hearing on this. The committee was prepared to do it. The objection came from your side of the aisle.

Senator SPECTER. The full committee was prepared to do it?

Chairman FEINGOLD. To have a hearing on this.

Senator SPECTER. When?

Chairman FEINGOLD. Today. We had preferred that this would be a full committee hearing.

Senator SPECTER. And there was an objection from Republicans?

Chairman FEINGOLD. As I understand it, on that side of the aisle.

Senator SPECTER. I will take that up with President Bush.

Chairman FEINGOLD. Senator Sessions, if you would do your last round, I am going to try to conclude the hearing so that I can attend a meeting with the Secretary of State.

Senator SESSIONS. Mr. Chairman, I don't know that I will pursue this any further. I know we do have a time crunch. I would offer for the record a letter from the Fraternal Order of Police supporting this legislation.

Chairman FEINGOLD. Without objection.

Senator SESSIONS. Also, letters from four former Attorneys General—Griffin Bell, under President Carter, and Thornburgh, Barr and Meese—all supporting this legislation.

Chairman FEINGOLD. Without objection.

Senator SESSIONS. I would just say that most of the issues we are dealing with—I guess Dean Kmiec referred to policy and this legislation being crafted carefully not to conflict with the Constitution. I think most people don't believe it conflicts with the Constitution. It does require the amendment of statutes concerning pen registers where Congress has placed extra-constitutional restrictions on pen registers, trap and trace. It doesn't mention mail cover, but we have rules for mail covers that are done. So I have felt that for the most part we are doing the right thing.

With regard to people who are here by permission, immigrants, I feel like we have a reasonable basis to be more restrictive. Even if we don't have proof beyond a reasonable doubt that they are participating in an activity that plans to kill Americans, we may have sufficient proof to ask them to go home. So that is what we are wrestling with.

I do believe it is important for us to slow down and be careful. I know a lot of people are scared that we are going to fundamentally deprive ourselves of constitutional rights. I don't see that here in this legislation, but it doesn't hurt to slow down and be careful.

I am, as Senator Specter has said, a bit concerned that a small group on our committee seems to be about to deliver us a bill which we have not read or seen. I have had some interest in it, and I know he has and I know Senator Kyl has been interested in these issues for years. It is a little bit frustrating, frankly, and that could be another cause for delay.

Thank you, Mr. Chairman.

Chairman FEINGOLD. I thank you.

I would ask unanimous consent that a statement by Senator Thurmond be included in the record, without objection.

We will hold the record of the hearing open for a week, if the witnesses or other organizations wish to submit additional materials.

I also ask unanimous consent to put a statement by Senator Maria Cantwell into the record, without objection.

That brings us to the conclusion of the hearing. As we all know, the anti-terrorism legislation is on a fast track and will be considered, in all likelihood, by the Senate soon. So I do think it is terribly important that we had this hearing today, and I think the Senate and the Nation will benefit from your testimony.

Let me also reiterate something that the Chairman said when he was here. This hearing focused on the constitutional issues arising from the anti-terrorism legislation. I also believe that we should review the serious civil rights issues that have arisen as a result of our Nation's response to the September 11 attacks, like acts of violence and discrimination against Arab Americans, Muslim Americans and South Asian Americans. We are looking forward to working with Senator Leahy to arrange for a hearing of the full committee, or at least the subcommittee, on that matter.

I thank you, and the hearing is adjourned.

[Whereupon, at 11:26 a.m., the subcommittee was adjourned.]

[Questions and submissions for the record follow.]

[Additional material is being retained in the committee files.]

QUESTIONS

Questions submitted by Senator Sessions for David Kris

1. PRACTICAL EFFECT OF CHANGING "THE PURPOSE" TO "A SIGNIFICANT PURPOSE" IN FISA

Mr. Kris, under the Foreign Intelligence Surveillance Act (FISA), to issue a surveillance order, the court must find probable cause that the target of the surveillance is an agent of a foreign power, including a member of an international terrorist group, and the government must certify that "the purpose" of the surveillance is to obtain foreign intelligence information.

Under current law, I understand that our intelligence personnel can share information with our criminal investigators. However, if the criminal investigators provide direction back to the intelligence officers concerning what evidence is needed

to convict, for example, a thief who is about to supply a terrorist with stinger missiles, the government must either obtain a criminal surveillance warrant, if possible, or not take the direction from the criminal investigators. Thus, in a hypothetical case, if the government does not have sufficient information to identify the thief and obtain a criminal surveillance warrant, it may not be able to stop a sale of stinger missiles to a terrorist by arresting the thief. Is that correct?

If Congress changes "the purpose . . . to obtain foreign intelligence information" to "a significant purpose," would FISA then allow criminal investigators to provide more assistance to our intelligence officers in gathering evidence and arresting a suspect for violation of criminal law before he supplies deadly weapons to a terrorist?

CONSTITUTIONALITY OF "A SIGNIFICANT PURPOSE"

Mr. Kris, is it true that the "primary purpose . . . to obtain foreign intelligence information" test was developed prior to the enactment of FISA and was the product of a Fourth Amendment balancing test that weighed the suspect's privacy interests against the President's power to protect the people from foreign threats?

Is it true that the primary purpose test dealt with determining when the Government could conduct warrantless surveillance?

Is it correct that the Foreign Intelligence Surveillance Act (FISA), which Congress enacted in 1978, statutorily requires a warrant to conduct foreign intelligence surveillance even when the Constitution does not?

Is FISA more restrictive on the Government than the Fourth Amendment to the Constitution?

If the statutory standard were lowered from "the purpose" to "a significant purpose," would the government still have to meet the constitutional standard to obtain a FISA warrant from a court to conduct surveillance?

And to take evidence gathered under the FISA warrant to trial, would the Government have to convince a second judge that the evidence was gathered consistently with the Constitution?

And during time of war, when the President's commander-in-chief powers must be considered in the Fourth Amendment balance, could these courts reasonably hold that a significant purpose to gather foreign intelligence would suffice when the Government obtains a warrant to conduct the surveillance?

Would changing the FISA standard to "a significant purpose" enable the Government to conduct FISA surveillance on ordinary Americans or even criminal suspects for whom a court does not find probable cause to believe that they are agents of a foreign power?

SUBMISSIONS FOR THE RECORD

Statement of Hon. Maria Cantwell, a U.S. Senator from the State of Washington

The events of September 11th have changed us as a country forever. The question that remains open is in what ways exactly will the change be reflected? We must do all that we can to stop terrorism by finding and disrupting terrorist activities here and abroad. But we must do this without compromising the values that make Americans unique and have allowed us to become great—value for the personal autonomy and rights of the individual and for the tolerance of all regardless of race or religion.

While I believe it is vitally important for our country to address pressing issues of national security including the gathering of intelligence information and rethinking how we coordinate domestic security at our borders, we must not lose sight of the principles our country is founded upon. We cannot and must not let the events of September 11 cause us to indulge in violence against others based on their race or their religious beliefs, and we cannot let fear of further terrorist events cause us to make decisions now that do damage to historic respect for the civil liberties and the privacy of individuals.

I have been disheartened that my state has seen incidences of hate crimes against ArabAmericans, Muslims and Sikhs in the wake of the attacks. In the most serious incident by far, an individual has already been charged with shooting at several people and setting fire to the cars of worshippers outside a mosque in Snohomish. In addition, Kulwinder Singh, a Sikh cabdriver, was harassed and physically assaulted by a passenger in King County, and over 40 students from the United Arab

Emirates have withdrawn from Washington State University. In Shoreline, a city just outside Seattle, people apparently scoured the yellow pages searching for the word "Arab" only to leave a frightening message on the answering machine of the Arabic Language and Translation Service. I condemn this type of violence and hatred which merely compound the horror of loss of life as a result of the terrorist attacks.

Perhaps more alarming even than the physical violence and threats that have been made, are the new prejudices that face many of our citizens and residents. Our Arab and South Asian immigrants to Washington state sought to move to America not just for economic opportunity but for a way of life that embraced tolerance and diversity. Yet today they live in fear of their neighbors. People of Islamic faith, and others who fear that they may be confused for someone of Islamic faith hide in their homes, fearful they will be the target of persecution. This type of discrimination cannot stand. We cannot let the fear of unknown terrorists cause us to engage in the very type of intolerance and racial segregation that have dogged so many countries.

We in Washington state have amongst us, as reminders of the consequences of intolerance, many of the Japanese who were either interned themselves or have family members who were victims of internment. We cannot forget how unjustified our treatment of them was, and we must learn from them and our history that the face of the enemy must be distinguished from the physically similar face of our neighbors who are loyal Americans. We must not pass laws that give the government unfettered authority to indefinitely detain people who are legally in this country or who are permanent residents of this country. To do so is to reject the history and the lesson of the Japanese internment.

I have confidence that Americans are large enough in spirit to meet the challenge of tolerance, and that these instances of physical violence will not continue. I urge that we take a look inside ourselves and recognize that the pain we feel is the also the pain felt by people of Islamic faith, and others of Arab descent. They too are Americans. They are people of faith. There is no real "Islamic terrorist"—some terrorists may believe in Islam, others may have other religious beliefs—but it is the terrorism that we abhor, not the true religious belief, or those who simply share those beliefs.

I also believe that we face another challenge right now. That challenge rests largely with those who are members of the Judiciary Committees here in the Senate and in the House—to stop and reflect how we can continue to balance the unique freedoms and rights that come to us as American citizens with the need to track and disrupt terrorists at work in this country and abroad.

We have good reason to change our laws to improve the ability of our law enforcement and intelligence communities to do their job. And I strongly support many of the changes this Committee has been considering. I am pleased that progress has been made on most of the contentious provisions and am very hopeful that we will be able soon to pass the legislation needed to address the immense problem of terrorism in this country and around the world.

However, we are moving at an incredible pace on some changes in law that will potentially effect Americans for a long time to come. Much of the debate really centers around lowering the standard for electronic eavesdropping by the government without abridging Americans' Fourth Amendment protection against unreasonable search and seizure.

I am particularly concerned about how we may expand wiretap authority under Foreign Intelligence Surveillance Act—make no mistake about it—if not done right, these changes can affect the ability of the government to wiretap the lines of American citizens—not just foreign terrorists.

Further, I hope that we can enact the provisions authorizing law enforcement to access certain aspects of electronic communications in the same way they can get telephone numbers. But we must make sure that the scope of the provision is narrow and does not allow access to the content of communications without a separate showing to a judge.

I believe that law enforcement does need some new tools to meet the challenge of fighting terrorism. However it is even more crucial to promote the sharing and coordination of information among agencies that have traditionally had separate responsibilities that now intersect in the effort to fight terrorism. I am determined that the fight against terrorism requires not just law enforcement tools and wiretaps but rather requires us to develop the single best most coordinated effort of sharing and analyzing information to disrupt terrorist planning and rout out terrorist sympathizers. And a key part of this effort must be the development of a better system for granting visas such that we know who is coming in to our country and we are able to stop them at our borders. Technology now exists that allows

agencies to share information about suspected terrorist affiliates in real time and such capabilities should be better utilized.

While I am not the first or the last to say it, it remains an essential truth that if we surrender our unique freedoms and rights, that the terrorists have inflicted a harm even greater than the calamitous deaths of thousands of innocent civilians and the destruction of symbols of American innovation and power. We must not as citizens or as legislators act out of fear to damage our tradition of tolerance or curtail our rights and liberties.

FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION
WASHINGTON, DC 20044
October 3, 2001

Senator Strom Thurmond
United States Senate
Russell Building, Room 217
Washington, DC 20510

Dear Senator Thurmond:

On behalf of the 20,000 members of the Federal Law Enforcement Officers Association (FLEOA), I wish to inform you of our strong support of the Administration's proposed anti-terrorism measures. FLEOA urges you to support the passage of these measures with all due speed.

The Administration's proposed initiatives focus on giving this nation's law enforcement officers the needed tools to investigate and eventually bring to justice the terrorists responsible for the September 11, 2001, attacks on our Nation. Certain groups and individuals are opposed to these initiatives due to their concerns regarding our civil liberties. FLEOA too holds dear our civil liberties, and legitimate concerns we respect. However, the legislation currently under consideration will allow Americans to enjoy their civil liberties and at the same time enable law enforcement to hunt down terrorists. Certain tools proposed for law enforcement's that raise concerns come with judicial review before their use can be implemented. As an organization on the front lines of America's fight against terrorist, we remind everyone, allowing terrorist's unfettered access to our shores does not enhance American's civil liberties.

The Administration's measures appropriately address the national security issues that should be the overriding concerns of all. The proposals will ensure we can live in this great country and continue to enjoy our rights and liberties in peace. FLEOA urges the quick passage of this legislation.

RICHARD J. JALLO

FRATERNAL ORDER OF POLICE
WASHINGTON, DC, 20002
September 24, 2001

The Hon. Orrin G. Hatch
Ranking Member,
Committee on the Judiciary
United States Senate,
Washington, DC 20510

Dear Senator Hatch:

I am writing on behalf of the more than 299,000 members of the Fraternal Order of Police to advise you of our strong support of the Administration's proposed anti-terrorism measures.

On 11 September, the United States fell victim to an evil and cowardly attack, perpetrated by individuals with a complete and total disregard. for human life and the law of nations. The victims of these attacks and their families demand justice, and the assurances of the Federal government that everything that can be done to ensure the future safety and security of our nation will be done. The pleasures brought forward by President Bush and Attorney General Ashcroft appropriately address these concerns.

Not only will the Administration's proposed measures provide law enforcement with the tools they need to quickly hunt down the criminals responsible for this unprecedented assault on America, but will also bolster our efforts to protect and defend this great land. These measures are not new, but they represent what is right and what is needed at this critical moment in our nation's history,

Some will suggest to you that these proposed measures threaten to curtail the civil liberties which we all hold dear. As the elected representative of those who place their lives on the line in defense of American rights arid liberties, I strongly and respectfully disagree with that assertion, The proposed legislation will ensure that those of us who live in the United States can continue to enjoy our rights and liberties in peace, and without fear of terrorists and the mechanisms which support them.

On behalf of the membership of the Fraternal Order of Police, I lend my voice to the millions of citizens asking Congress to enact these proposed measures with all possible speed, and urge you to work with President Bush to give us the tools we need to protect all Americans. Please do not hesitate to contact me, or Executive Director Jim Pasco, if we may be of any assistance or provide you with additional information.

Sincerely,

STEVE YOUNG
National President

GERMAN AMERICAN EDUCATION FUND
GLENVIEW, IL 60025
October 8, 2001

The Hon. Russell D. Feingold,
Chair, Subcommittee on the Constitution,
Federalism and Property Rights
Committee on the Judiciary
United States Senator
Washington, D.C. 20510

Attention: Farhana Khera, Esq. Majority Counsel

Dear Senator Feingold:

Please include the attached letter, dated October 8, 2001, in the hearing record for the above referenced hearing held on October 3, 2001. It contains pertinent information regarding the US government's violations of civil liberties pursuant to the Alien Enemies Act and endured by Germans, Japanese and Italians during WWII. This information is relevant to Congress's assessment of the antiterrorism package under consideration. As we were after Pearl Harbor, we are now at a crossroads. Only this time the terrorism perpetrated on America could affect the civil liberties of Muslims and Arabs, instead of German, Japanese and Italians. While we must be very mindful of national security concerns, we must also be certain not to abridge the Constitutional rights of Muslims and Arabs in America unnecessarily, particularly those who call our nation their home.

Thank you for championing our Constitutional freedoms. You are right. Our Constitution must always guide our actions, and freedom is a most precious commodity. Thank you for defending it for all of us.

With best regards

ELSBETH M. SEEWALD,
Chairman, GAFF

GERMAN AMERICAN EDUCATION FUND
GLENVIEW, IL 60025
October 8, 2001

Sen. Russell D. Feingold
Chair, Subcommittee on the Constitution,
Federalism and Property Rights
Committee on the Judiciary
United State Senate
Washington, DC 20510

Dear Senator Feingold,

As our government responds to the horrendous September 11 attacks, we must not the ignore Constitutional freedoms which form the basis of our democracy. Thank you for holding a hearing on this very important topic. Adequate protection of our civil liberties and national security requires careful balancing. In assessing the various alternatives, history can provide much-needed guidance. At the Subcommittee's hearing on October 3, the immigrant provisions of the antiterrorism legislation were discussed at length. Of particular concern was the risk of violating the civil liberties of aliens who the Department of Justice deems to be potential security risks. Allowing governmental detention of aliens on the basis of suspicion requires great scrutiny because it is such an incursion on one's liberty. Noticeably absent from the hearing testimony was any meaningful discussion of the government's WWII alien enemy program and its impact. The WWII alien enemy program is instructive because many parts resemble the enhanced immigrant provisions being considered as part of the antiterrorism legislation.

After Pearl Harbor, President Franklin D. Roosevelt issued proclamations granting Attorney General Francis Biddle plenary authority almost one million German, Italian and Japanese aliens pursuant to the Alien Enemies Act. 50 USC 21–24. See also Presidential Proclamations 2525–2527, dated Dec. 7–8, 1941. Administered by the DOJ, the alien enemy program affected approximately one million German, Italian and Japanese aliens, many permanent residents of the US. Stripped of any Constitutional rights, DOJ afforded these aliens little due process. All alien enemies were subject to travel and property ownership restrictions. Those living or working in hastily established prohibited zones were forced to abandon their homes and places of work. J. Edgar Hoover's FBI raided thousands of homes seeking evidence against suspected fifth columnists. The presence of an alien justified a search. During the war years, thousands were arrested and detained indefinitely awaiting DOJ's final internment decision.

DOJ established its own standards justifying indefinite internment, then acted as prosecutor and judge. The U.S. attorney and the FBI appeared before DOJ-appointed civilian hearing boards to give evidence, frequently based on tips and innuendo. The accused alien could present only two character witnesses and had no right to counsel, to contest the proceedings or to know the reason for detention. Hearing boards recommended release, parole or internment. In passing final judgment, DOJ often ignored more lenient recommendations, ordering internment if it found a suspect "potentially dangerous to the public peace and safety of the United States." The standards forming the basis for such decisions were vague and unknown to prospective internees. No right of administrative appeal or judicial review existed. On rare occasions, DOJ granted rehearings.

More than 25,000 were interned, including 11,000 Germans, 11,000 Japanese and 3,300 Italians. These internees, including many American-born children and spouses, languished in Immigration and Nationalization Serviceadministered camps throughout the United States. A majority of internees were permanent residents of the United States and certainly deserved a higher degree of Constitutional protection. Thousands were exchanged for Americans in Germany and Japan. Families were torn apart and homes lost. Internment should have ended in 1945, but President Harry Truman issued an Executive Order requiring hundreds of "potential security risks" to remain interned years after the war, primarily Germans. They had no means of escape except deportation, until finally they were released. The last internee was freed in 1948.

Significantly, all persons of Japanese ancestry who were interned, either due to removal from the West Coast or pursuant to the DOJ alien internment program, were granted government redress and an apology. As required by Congress, the DOJ is now assessing the US government's World War II violations of Italian American civil liberties, including its own. In August, you, Senators Chuck Grassley and Ted

Kennedy introduced the Wartime Study of European Americans and Refugees Study Act to establish a commission to study the European American WWII experience and related civil liberties violations. One overriding responsibility of that commission would be to make recommendations as to how best to protect civil liberties during times of national crisis. We have now learned that such a crisis can arise in a matter of seconds. If the commission's work was completed, it could provide more of a framework for the legislative response being considered today. We hope that your bill will pass promptly through Congress. In the meantime, however, legislators would do well to analyze the historical impact of programs it has apologized for in the past, as they decide how to treat aliens who are suspected security risks today.

Please do not hesitate to contact Karen Ebel or me for further information.

Best regards,

ELSBETH M. SEEWALD
Chairman

October 5, 2001

The Hon. Russell D. Feingold
Chairman, Subconmuttee Constitution,
Federalism, and Property Right
Washington, DC 20510–4904

Dear Senator Feingold:

Enclosed you will find my prepared statement for inclusion in the printed public record of the Subcommittee's hearing on the Anti-terrorism Act of 2001. I think it is imperative chat a statement of an eyewitness to the events of arrest, search and seizure, and indefinite detention and internment in the United States during World War II be included in the public record.

For the record I am American-born citizen of the United States, I am an eyewitness to the events of the arrest, internment and deportation of German Americans during World War II, In 1973 I retired as a regular officer from the United States Air Force after more than 21 years of service. I hold both a Bachelors of Science and M.D. A. degrees from Arizona State University, Tempe, Arizona. I am the co-author of the 1500-page research volume, German-Americans in the World Wars, The World War Two Experience. The Internment of German-American, published by K.G. Saur, Munich, Germany, 1995.

I thank you and the members of the committee for providing me with the opportunity to submit a statement for the public record.

Sincerely,

Statement of Arthur D. Jacobs, Major, USAF Retired

Mr. Chairman and members of the committee, I am an American, an American of German descent. I was born in Brooklyn, New York. I am also a retired regular officer of the United States Air Force (USAF). Thank you for the opportunity to make this statement regarding, "protecting Constitutional Freedoms in the Face of Terrorism," or the "Anti-terrorism Act of 2001."

Just six years before I enlisted in the USAF I was imprisoned at the age of twelve with my family at Ellis Island, New York Harbor from February 27, 1945 to April 25, 1945. At the end of April we were transported under armed guard to the Immigration and Naturalization Service camp at Crystal City, Texas. There we were held in captivity for seven months, from May 1945 through November 1945, after which we were taken back to Ellis Island where we were held for almost two months—December 1945 through January 17, 1946. On January 17, 1946 we were transported to the Troopship Aiken Victory for deportation to a war-torn, starving Germany.

Upon debarkation on January 26, 1946, from the Aiken Victory at Bremerhaven, Germany, American soldiers armed with machine guns, carbines, and pistols met us at the bottom of gangplank. These soldiers transported us by truck to Bremen, Germany (some 50 miles to the south]; there they loaded us into boxcars in which they transported us for same three days and nights during frigid temperatures to Ludwigsburg, Germany. The interior of the boxcar was pitch black, freezing, and was tilled with an indescribable stench. Our latrine facility was a foul-smelling open

bucket. After we arrived in Ludwigsburg, we [1] were transported to a prison called Hohenasperg [a 15th century citadel, also known as Camp 76, U.S. Seventh Army Internment Camp].[2]

We committed no crimes, no espionage, no sabotage, and no acts of terrorism, yet we went through the ordeal I just described. And if anyone was terrorized it was my father. The events I have depicted destroyed my family. It was a traumatic experience that my invalid mother never overcame.

Even though the events I have explained took place almost 57 years ago, Congress has yet to act to examine and/or correct the injustices that befell my family and thousands of other German Americans. During the past 15 years I have written hundreds of letters on this matter to members of Congress on both sides of the aisle. It. took 15 years to have the internment of German Americans recognized in a congressional document,[3] This milestone was reached when Congressman Matt Salmon wrote on November 19, 1999;

"As we reach the end of the century, I urge my colleagues to purse a full historical accounting of the experiences of all Americans who suffered discrimination during the Second World War as expeditiously as possible." [4] Twenty months later Senator Feingold introduced S. 1356, Wartime Treatment of European Americans and Refugees Study Act (Introduced in the Senate August 3, 2001).[5] This was the second major milestone reached in my pursuit of justice.

Before S. 1356 was introduced, two laws related to the internment program of the United States during World War 11 were enacted, they are: P.L. 100–383 [8/10/1988], The Civil Liberties Act of 1988 and P.L. 106–451 [11/17/2000], Wartime Violation of Italian American Civil Liberties Act, to address injustices [civil liberties violations] suffered by Japanese Americans and Italian Americans respectively. Both of these laws seemingly skirted or set aside the civil liberties violations of German Americans; justice would have required that P.L. 100–383, The Civil Liberties Act of 1988, include all Americans who suffered discrimination, i.e., arrest, internment, and/or deportation, during the Second World War.

Since the terrorist attack of September 11, 2001 much has been stated and debated throughout this country in regard to protecting the civil liberties of Arab Americans and American Muslims. During the debates on the matter of indefinite detention and curtailing civil liberties, the case of the internment of Japanese Americans during World War II is often intenwined.[6] However, the civil liberties violations of German Americans during this same time period are not mentioned. To my knowledge Senator Feingold, you are the only member of Congress who has, during this crisis, made note of the injustices suffered by the German Americans and Italian Americans in the United States during World War II, This is an important statement because it informs the public that during war, civil liberties tend to take a back seat to public security. Your statement is also significant in that it reveals the context of interruiient, it is neither race nor ethnicity that causes us to curtail the civil liberties of Americans—citizetts and permanent resident aliens—but ii tells us that.such actions are based upon whether one's race and/or nationality is that of the enemy.

I was disappointed that the subcommittee's panel of witnesses for this hearing did not include eyewitness testimony in regard to the blatant disregard of the civil liberties of German Americans prior to, during, and after World War II, For example, eyewitnesses of the period could have provided the members of the committee with a sense of what it was like to have been arrested by a blanket arrest warrant, to have their home ransacked and searched, their personal property confiscated, and to have been indefinitely detained.[7]

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[1] My father, my brother and I. My mother was taken to another internment camp

[2] The rest of my story can be read in my Book, *The Prison Called Hohenasperg*: An American boy *betrayed by his Government during World War II*, May 1999, Publish, FL, ISBN:1–5811–832–0.

[3] This is true cxcept for my statement in Appendix II (page 133) of S. Hrg. 102–468, July 25, 1991. Americans was also noted in regard to violations of civil liberties. Several German Americans internees were not freed until August 1948, more than three years after war in Europe had coded.

[4] Proclamation No. 2526—Hon. Matt Salmon, Congressional Record, Extension of Remarks, November 19, 1999, pp. E2525–E2526.

[5] Senators Kennedy and Grassley are cosponsors of this bill.

[6] Senator Leahy and two members, Messrs. Cole and McGinnis, of your witness panel in their written statements made note of Japanese Americans, without mentioning German Americans. In an evening broadcast on the day [1013/20/11] or this hearing, during CNN's Crosstalk the internment of Japanese Americans was also noted in regard to violations of civil lobdrtics.

[7] Several German Americans internees were not freed until August 1948, more than three years after war in Europe had ended.

Furthermore, eyewitnesses could have also told the committee that while their civil liberties were being violated, no one bothered to tell them the nature and cause of the accusation and why they were chosen to sit out the war behind barbed wire. Eyewitnesses could have told you that they were neither confronted with witnesses nor were they afforded counsel for their defense. Eyewitness could have also described the ineffectiveness of judicial review during war for those whose ethnicity was that of the enemy, finally, eyewitnesses could have informed the subcommittee how they were unfairly targeted.

During times of war all Americans—citizens and permanent resident aliens—must pay a price. Inductees in the U.S. Armed Forces gave up many freedoms. Many pay the ultimate price—their life. Others pay a much smaller price such as unlawful search and seizure, arrest, internment and deportation and other such inconveniences. Senator Feingold and members of the committee sometimes a nation must do what it must, to protect the peace and public safety.

During World War II, the warrant for my father's arrest, dated February 23, 1944, was a "fill in the blank warrant" which reads in part, "whom I (Attorney General] deem dangerous to the public peace and safety of the United States. The said alien [Lambert D. Jacobs] is to be detained and confined until further order." Even through my father committed no crimes, was not a spy, saboteur, or terrorist, he was apprehended with a blanket arrest order that had the original date of December 8, 1941, Even though my father committed no crimes, was not a spy, saboteur, or terrorist, he was apprehended with a blanket arrest order that had the original date of December 8, 1941, stricken and replaced with February 23, 1944. Ultimately, my father was interned with his family for the duration of the war and longer.

During World War 11 injustice did not distinguish between race and ethnicity. All permanent resident aliens of enemy nationality and some American citizens of the race and/or nationality of the enemy were subject to injustices. Injustice is no respecter of persons, race, or ethnicity during times of war and terrorism when the peace and public safety are at risk.

ARTHUR D JACOBS
Major, USAF Retired

Statement of Hon. Jon Kyl, a U.S. Senator from the State of Arizona

INTRODUCTION

Sadly, the events of September 11 demonstrated, as no other recent occurrence has been able to do, that we must put aside the typical, painfully-slow process that often seems to rule here in times of peace. We cannot continue to yield the advantage of time to those who will continue to murder Americans and our allies until we stop them. We are in a race to ensure the safety and security of our citizens, and there is literally no time to lose.

WE ARE NOT RUSHING FORWARD WITH ILL-CONCEIVED LEGISLATION

Fortunately, we are not rushing forward with ill-conceived legislation. We are finally putting in place important tools that will enable our nation's law-enforcement personnel to more effectively investigate and prevent further attacks on the people of the United States. Since September of 1998, the Senate Judiciary Committee or its Subcommittee on Technology, Terrorism and Government Information has held thirteen hearings on terrorism. The witnesses who appeared before the Committee in those hearings included Louis Freeh, former Director of the FBI, and representatives of all three of the congressionally mandated commissions on terrorism that have issued reports over the last two years.

Most of the provisions contained in the Attorney General's proposed legislation have already been examined by the committee of jurisdiction. These provisions mirror the recommendations of one or more of the major terrorism commissions. In fact, some of these provisions have already been voted on and passed by the Senate.

The language sent forward by the Attorney General to establish nationwide trap and trace authority is included in the Hatch- Feinstein-Kyl Amendment to the recently passed Commerce, Justice, State Appropriations Bill. Much of the remaining language in that amendment was included in a bill we passed in the Senate last fall, entitled the "Counter terrorism Act of 2000." We passed that bill, S. 3205, after significant debate and numerous hearings.

NEED ACTION NOW

Nearly a year after we passed it the first time, and three full weeks after the unspeakable acts of terror that occurred on September 11, we still have members of this body dragging their feet and saying we are moving too quickly to pass counter-terrorism legislation. A recent *New York Times* article quoted one of my colleagues saying he, "would not be rushed, noting that Congress took almost two months to pass antiterrorism legislation in response to the Oklahoma City bombing in 1995."

I appreciate the fact that some of my colleagues do not like to be rushed, but we are talking about legislation that has been requested by both Democratic and Republican administrations since 1995. Some of it, the Senate has already voted to enact. Taking two months to pass antiterrorism legislation in response to the Oklahoma City bombing is not something of which we should be proud. And if we take another two months to act after an even more heinous act of terrorism, we will be giving terrorists who are already around the first turn, a full lap advantage in this race. That is not what the American people are expecting from their leaders at this time.

CIVIL LIBERTIES

Let me address briefly the concerns voiced by some of my colleagues. Namely, that we are in danger of "trampling civil liberties" in our rush to pass counter-terrorism legislation. I reiterate that we are not rushing. The legislation we have already passed, and the legislation now offered by the administration, was under consideration long before the events of September 11. We have already held hearings on these issues. Most importantly, there is nothing being requested that broadly impinges on the rights and liberties of U.S. citizens or raises any constitutional questions.

The bill would give federal agencies fighting terrorism the same tools we have given those fighting illicit drugs, or even postal fraud. The tools in the Administration are needed updates to the criminal law to keep pace with changes in technology. These are changes at the margins, not fundamental changes in privacy.

While some of these tools are extremely helpful in terrorism investigations, it makes no sense to refuse to apply these common sense changes to other crimes in cases like kidnapping, drug dealing, and child pornography. It is unwise to limit these tools to only terrorism offenses because often, at the outset of an investigation of a particular person or crime, you do not know what you are dealing with. People do not walk around with t-shirts that say "I am a terrorist." A credit card fraud case or a false immigration documents case, may turn out to connected to funding or facilitating the operations of a terrorist group. Therefore, we should give law enforcement all of these tools to have the best chance of discovering and disrupting these activities.

CONCLUSION

I support the request of the Attorney General, and I urge my colleagues to give this body due credit for the work that has already been done over the last six years, in several committees, to bring credible counter-terrorism legislation to the floor. We have a responsibility to the people of this nation to act, and to act with all prudent haste, to ensure that those who are charged with protecting us from future terrorist attacks are empowered to do so.

We cannot afford to lose this race against terror, and we cannot afford to give the enemy in this war a full lap head-start.

EDWIN MEESE III
WASHINGTON, D.C. 20002
October 2, 2001

Senator Patrick Leahy
Chairman
Senator Orrin Hatch
Ranking Member
U.S. Senate Judiciary Committee
Washington, D.C. 20510

Dear Chairman Leaky and Senator Hatch:

In the aftermath of the events of September 11, it is clear that the United States is extremely vulnerable to terrorism. The Bush Administration has a great responsibility in bringing those involved to justice and in helping protect the Nation from further terrorist attacks.

The Justice Department has drafted a series of measured, reasonable proposals to assist law enforcement at this critical time. We believe they deserve timely, favorable consideration in Congress.

The package contains tools that will help authorities more efficiently and effectively track the communications of terrorists. It would provide our law enforcement and intelligence communities the authority they need to better share crucial information in a timely manner. Also, it would increase criminal penalties against terrorists and those who harbor them.

Some of the provisions would update our laws to keep pace with technology, and have been sought in the past to respond to computer hacking and similar crimes. Others would add terrorism to authority that law enforcement already uses to fight crimes that lawmakers decided many years ago must be a national priority, such as illegal drug use. We believe (hat the proposals are consistent with the Constitution and would not unduly interfere with the liberties that we as Americans cherish,

We appreciate your consideration of this important matter.

Sincerely,

EDWIN MEESE III

NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ALEXANDRIA, VIRGINIA 22314
October 2, 2001

The Hon. Patrick J. Leahy
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510–6275

The Hon. Orrin G. Hatch
Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510–6275

Dear Chairman Leahy and Senator Hatch:

As the President of the National District Attorneys Association I want to most strongly urge the Senate to pass those protions of the "Anti-Terrorism Act of 2001" that enhance the ability of law enforcement to conduct electronic surveillance on those who would bring terror to our shores.

Since at least1992 this Association, through actions of its Board of Directors, has continually urged that law enforcement be capable, with proper authority, to safeguard our citizens through the use of electronic surveillance techniques.

In 1994, the late William O'Malley, the District Attorney of Plymouth County, Massachusetts, and the President of this Association testifying before your committee stated that;

> "If the law enforcement community does not have the opportunity to keep pace with advanced telecommunication technologies then the criminals who do have access to this technology will impunity."

Then as recently as last May, the Honorable Joseph I. Cassilly, State's Attorney for Harford County, Maryland, and Chair of our Cyber Crime subcommittee, in testifying before the House Judiciary Committee on cyber crime, said:

"With these problems have come the development of new investigative challenges, . . . defining jurisdiction of a crime that spans dozens of states or countries, getting cooperation from service providers, record storage sites and investigators in other states or countries, new laws regarding obtaining evidence or working with laws in foreign jurisdictions."

To counter the threat of criminals that communicate on a worldwide basis in real world time we need at least some semblance of parity. International terrorists and drug dealers alike have access to the latest in technology and has recently been proven, are not loathe to exploit their superiority.

Law enforcement needs multi-jurisdictional warrants; the ability to freely exchange information between law enforcement organizations and with intelligence clements; the enhancement of "trap and trace" authority; expedited access to information in emergency circumstances and expanded subpoena authority for communications records to identify subscribers.

For almost a decade we have been pleading for the tools and the laws we need to protect the people in our communities. We will never know if we could have prevented the tragic consequences of September 11th had we had the investigative tools we have been asking for since 1992. We only know that we will need every advantage to prevent such a tragedy from every occurring again.

Sincerely,

KEVIN P. MEENAN
District Attorney, 7th Judicial District, Cassper WY
President, National District Attorneys Association

Statement of Southeastern Legal Foundation, Atlanta, Georgia

The Foundation wholeheartedly supports President Bush's declaration of war against terrorism, and supports giving law enforcement and national security officials the tools they need to wage this war. However, the Foundation, along with many other public interest groups and legislators on both sides of the aisle, was gravely concerned that the legislation requested by Attorney General John Ashcroft went too far in eclipsing vital constitutional protections of law abiding citizens.

The Southeastern Legal Foundation applauds the work of the House Judiciary Committee on the "Patriot Act," the package of reforms requested by the Bush Administration to deal with the terrorist war against American civilization.

It is important for us to remember that new laws will be worthless if they are not enforced. We already have laws that should have prevented these attacks. It is a major scandal that fully 15 of the 19 hijackers were in the U.S. on expired visas. If we had simply enforced the visas and deported these people as the law already requires then in all likelihood the attacks would have been thwarted. This would be preferable to surrendering individual freedoms to the fight against terrorism.

Foreign nationals here on student visas routinely overstay. Former Deputy Assistant FBI director for national security Dale Watson testified before Congress that "we know for a fact that organizations funded by a state sponsor of terrorism fund students coming to the United States . . . and that is part of their intelligence organization." Remember, in this vein, that a terrorist who bombed the World Trade Center in 1993 entered the U.S. on a student visa. In 1996, Congress passed a law requiring universities to report the whereabouts and status of all foreign students in the U.S. to a $40 million electronic tracking system. The law has even been funded by Congress, yet the system has never been used. But now there are proposals for legislation to make educational institutions open their records to federal law enforcement. This would not be necessary if over the last five years this tracking system had been implemented.

It is appalling that on April 1,1994, the Clinton administration ordered the INS to stop conducting routine fingerprint background checks on aliens receiving visas. In the year prior to this action, 9,500 visa applications were denied as a result of this check. In the intervening seven years at that rate some 70,000 visas have been granted to individuals who would have flunked the fingerprint background check. Is it any wonder that the enemy wandered freely in our midst?

We do not need to surrender our civil liberties to solve these problems we need the will to properly enforce our immigration laws. We can no longer allow immigration policy to serve the interests of those seeking cheap labor, cheap votes, or a relief valve for discredited economic policies in other countries. Immigration policy is now an urgent matter of national security.

The Foundation was likewise concerned that permitting the executive branch to indefinitely detain aliens without judicial review, and is relieved that this provision has been removed from both the House and Senate versions of the bill.

The Foundation supports the Administration's proposal for sharing grand jury information with national security and intelligence officials. When terrorist acts are investigated and prosecuted as crimes, as was the case with the 1993 World Trade Center bombing, and the Khobar Towers bombing, a great deal of vital information is gathered by the grand jury which is directly relevant to our national security. After all, these are not random unconnected criminal acts, but are instead part of the enemy's integrated war plan against the United States. It is the very height of folly to deny our intelligence and national security forces information regarding enemy acts of war simply because it was a grand jury that uncovered it.

While allowing law enforcement to share information with national security officials should be allowed, constitutional restraints on law enforcement use of intelligence information in criminal prosecutions should be maintained. Thus, evidence illegally obtained by foreign governments should not be allowed in criminal prosecutions, and the House and Senate wisely removed these provisions.

The proposals for nationwide warrants and multi-point wiretap authority should be approved despite the Fourth Amendment risks as long as there is a sunset provision and the initial issuance is supported by judicial approval of the warrant. These are necessary and reasonable adaptations to the ways in which terrorists have taken advantage of technology and freedom of movement in our country. However, this legislation should also permit such a warrant to be challenged in any jurisdiction in which it is served in order to check forum shopping by the government.

The interception of electronic communications—e-mail and web surfing should be limited in the same way that PEN register and trap and trace devices are currently limited—to and from information can be collected, but not the content of e-mailed communications.

Proposed changes in the definition of what constitutes a "terrorism offense" are sufficiently overbroad that they could be applied to teenagers putting firecrackers into mailboxes. When an act meets this overbroad definition, then the entire panoply of surveillance and enforcement powers comes into play. The potential for abuse by overzealous government officials is extremely high. There is a difference between the youthful indiscretions of a teenager and a terrorist act, and the legislation should have the wits to reflect that by narrowing the definition of a terrorist act. Terrorist intent should be included in the definition of the offense.

Many years after the enemy first declared it, the U.S. has finally come to grips with the ugly reality of a new war against a furtive and ruthless enemy. New measures are clearly required, but we should not go too far. In properly limiting the dramatic expansion of power sought by the government, Congress is once again demonstrating the genius of the separation of powers. The Southeastern Legal Foundation adds its voice to the many liberal and conservative public interest groups supporting these limitations.

But these new measures will not alone suffice. The new resolve of the American people should also be directed to the scandalously lax enforcement of our immigration law. Our national defense requires it. Laws in several states and under consideration in others, including Georgia, permit issuance of drivers licenses to illegal aliens. Several of the hijackers had obtained drivers licenses from the state of Virginia, which facilitated their ability to move around the country and plan and execute their attacks. Even before September 11, 2001, the Southeastern Legal Foundation argued that issuing drivers licenses to illegal aliens directly undermines enforcement of immigration laws. In the current environment the practice also undermines our national security. Congress should adopt legislation forbidding states from issuing drivers licenses to illegal aliens.

Respectfully Submitted,

PHIL KENT
President

DICK THORNBURGH
WASHINGTON, DC 20005
October 2, 2001

Hon. Patrick Leahy
Chairman
Hon. Orrin Hatch
Ranking Member
U.S. Senate Judiraary Committee
Washington. D.C. 20510

Dear Chairman Leahy and Senator Hatch:

In the aftermath of the events of September 11, it is clear that the United States is extremely vulnerable to terrorism. The Bush Administration has a great responsibility in bringing those involved to justice and in helping protect the nation from further terrorist attacks.

The Justice Department has drafted a series of measured, reasonable proposals to assist law enforcement at this critical time. We believe they deserve timely, favorable consideration in Congress.

The package contains tools that will help authorities more efficiently and effectively truck the communications of terrorists. It would provide our lava enforcement and intelligence communities the authority they need to better share crucial information in a timely manner. Also, it would increase criminal penalties against terrorists and those who harbor theirs.

Some of the provisions would update our laws to keep pace with technology and have been sought in the past to respond to computer hacking and similar crimes. Others would add terrorism to authority that law enforcement already uses to fight crimes chat lawmakers decided many years ago must be a national priority, such as illegal drug use. We believe that the proposals arc consistent with the Constitution anal would not unduly interfere in the liberties we as Americans cherish.

We appreciate your consideration of this important matter.

Sincerely,

DICK THORNBURGH

Statement of Hon. Strom Thurmond, a U.S. Senator from the State of South Carolina

Mr. Chairman:

I appreciate the concerns that you and others have expressed about the need to maintain the constitutional freedoms that have made our country the greatest in the world. Our Constitution and the freedoms it protects have always been, and must always be, the bedrock of our Nation.

As I stated at our full Judiciary Committee hearing on terrorism last week, America is threatened today by an enemy unlike any we have faced before. Especially since the end of the Cold War, we have felt secure in knowing that our Armed Forces are the strongest in the world, and have the power to defeat any enemy who dares to invade American soil. However, the new enemies that we face know that they cannot overtake our government by force and rule our country. Instead, through death and destruction, they seek to intimidate us into submission.

Based on the events of September 11th, they are at war with us, and we are at war with them. But they are not hampered by the rules of war. They do not have the courage to attack our military bases. Instead, they enter our country and take advantage of the freedoms and conveniences that Americans take for granted, and then use them against us to kill innocent Americans.

America must do what is necessary to fight our enemies and defeat them. It is true that, in times of war, the freedoms and civil liberties that Americans enjoy have been restricted to some degree in certain circumstances, as discussed in detail in a recent book by Chief Justice William Rehnquist, *All the Laws But One*, but the actions of the government today do not approach these measures.

Contrary to what some suggest, our government is not seeking to limit our constitutional liberties and freedoms in response to this crisis. We must keep in mind that some of the groups opposing these measures believe that law enforcement

should not have critical tools it already has to fight crime today, such as any form of electronic surveillance.

The Bush Administration has a us to take some reasonable, measured steps to make terrorism a top priority in our criminal laws and to update our laws for modern technology. None of these proposals are unconstitutional, and none of them should cause innocent Americans any concern.

These proposals respond to the ongoing national security threat that our country faces today. We must better enable law enforcement to track the communications of terrorists. Our enemies use sophisticated technology, such as advanced computers and multiple cellular telephones, to take advantage of the deficiencies in current law. Under this bill, these laws would even reflect the reality of the 21st Century.

Some of these provisions have been sought in the past help law enforcement respond to hacking and other computer crimes. However, Congress failed to respond to the need. For example, Internet communications travel through many jurisdictions that have nothing to do with the place where crimes are being committed, and this proposal would eliminate such redundant jurisdictional barriers that impede ongoing, time-sensitive investigations.

A major goal of this package is simply to make our criminal laws reflect that terrorism is a top priority. They are not designed to give the government broad, new, untested powers. Instead, they add terrorism to the authority that law enforcement already uses to fight crimes that we decided years ago must be a national priority, such as the scourge of illegal drug abuse.

Administrative subpoena authority for terrorism is a good illustration. Law enforcement already has administrative subpoena power for drug offenses, child sexual exploitation, and even health care fraud, and these powers have been exercised in a reasonable manner.

Last year, the Congress added to this list administrative subpoena authority to help the Secret Service track those who threatened the President. Also, based on a bill that I introduced with Senator Biden in the last Congress, the Senate voted unanimously to expand the authority further to cover certain dangerous violent fugitives from justice. While all of these crimes are serious, they are certainly no more important than the fight against terrorism, and there is no reason terrorism should not be included in the list.

Acts of terrorism like we endured on September 11th are both domestic crimes and threats to our national security. We cannot allow artificial barriers between intelligence and law enforcement to imperil out ability to fight terrorism on American soil. Law enforcement and intelligence agencies must be given the ability to cooperate and share information more closely than they can now, and this legislation would accomplish that.

Further, we need to amend barriers to prosecution, such as short statutes of limitations for bringing charges. Also, we need to increase the penalties against terrorists and those who harbor them.

It is true that some of these provisions are not directly targeted to help authorities apprehend those involved in the September 11th attacks. However, terrorism takes a great variety of forms, and some of these proposals are needed to protect our country from other terrorist attacks that we could face at any moment.

Our country faces new dangers and uncertainties that were hard for many Americans to envision just a month ago. But as in decades past, Americans understand the threats we face and are willing to accept greater inconveniences and restrictions for greater security. As reflected in a Washington Post poll published on Saturday, the American people support giving law enforcement these critical tools.

A few weeks ago, the Senate passed some of the important and more controversial provisions in this package as an amendment to the Commerce-Justice-State Appropriations bill. I cosponsored this important measure. Similarly, the full Senate deserves the opportunity to consider the entire Justice Department proposal in the very near future. If it does, I believe the entire proposal will receive a level of strong support similar to the terrorism appropriations amendment.

As Attorney General Ashcroft has repeatedly said, we face a clear and present danger from future terrorist attacks. Law enforcement faces a tough challenge in responding to this sad new reality. These proposals will eliminate existing barriers to their ability to defend and protect us. They should be enacted into law.

Our constitutional freedoms are not in danger by the Attorney General's proposals. However, because of terrorism, what is in danger today is our national security. The legislation we are considering will help make America safer and more secure.

These reforms are long overdue. American lives are still risk. We cannot afford to endlessly deliberate and delay. We must take action now.

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS
Washington, D.C. 20530

The Honorable Bob Graham
Chairman
Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

Dear Senator Graham:

I am writing to relay to you the views of the Department of Justice on the constitutionality of amending the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1800–1863 ("FISA"), so that a search may be approved when the collection of foreign intelligence is "a significant purpose" of the search. In its current form, FISA requires that "the purpose" of the search be for the collection of foreign intelligence. 50 U.S.C. § 1804(a)(7)(B) and 50 U.S.C. § 1823(a)(7)(B). We believe that this amendment would not violate the Fourth Amendment. Amending FISA merely gives the Department the flexibility to conduct foreign intelligence surveillance that is permitted by the Constitution itself.

The Fourth Amendment declares that, "the right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated." U.S. Const. Amend. IV (emphasis added). The Amendment also declares that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." *Id.*

Thus, the touchstone for review is whether a search is "reasonable." *See, e.g., Veronia School Dist. 47J* v. *Acton*, 515 U.S. 646, 652 (1995) ("[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a government search is 'reasonableness.'"). When law enforcement undertakes a search to discover evidence of criminal wrongdoing, the Supreme Court has said that reasonableness generally requires a judicial warrant. *See id.* at 653. But the Court has made clear that a warrant is not required for all government searches. A warrantless search can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.*

As a result, the Court properly has found a variety of warrantless government searches to be consistent with the Fourth Amendment. *See e.g., Pennsylvania* v. *Labron*, 518 U.S. 938 (1996) (per curiam) (certain automobile searches); Acton, supra (drug testing of high school athletes); *Michigan* v. *Dept. of State Police* v. *Sitz*, 496 U.S. 449 (1990) (drunk driver checkpoints); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) (drug testing of railroad personnel); *Treasury Employees* v. *Von Raab*, 489 U.S. 656 (1989) (random drug testing of federal customs officers); *United States* v. *Place*, 462 U.S. 696 (1983) (temporary seizure of baggage); *Michigan* v. *Summers*, 452 U.S. 692 (1981) (detention to prevent flight and to protect law enforcement officers); *Terry* v. *Ohio*, 392 U.S. 1 (1968) (temporary stop and limited search for weapons).

In these circumstances, the Court has examined several factors to determine whether a warrantless search is reasonable. As the Court stated just last Term: "When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois* v. *McArthur*, 121 S. Ct. 946, 949 (2001). In creating these exceptions to its warrant requirement, the Court has found that, under the totality of the circumstances, the "importance of the government's interests" has outweighed the "nature and the quality of the intrusion on the individual's Fourth Amendment interests." *See Tennessee* v. *Garner*, 471 U.S. 1, 8 (1985).

Of particular relevance here, the Court has found warrantless searches reasonable when there are "exigent circumstances," such as a potential threat to the safety of law enforcement officers or third parties. The Court has also recognized that a government official may not need to show the same kind of proof to a magistrate to obtain a warrant for a search unrelated to the investigation of a crime "as one must who would search for the fruits or instrumentalities of crime." *Camara* v. *Municipal Court of San Francisco*, 387 U.S. 523, 538 (1967). For example, "[w]here considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would

justify such an inference where a criminal investigation has been undertaken." *Id.* See also Indianapolis v. *Edmond*, 531 U.S. 32, 44 (2000) (in context of seizure and exigent circumstances, Fourth Amendment would permit appropriately tailored roadblock to thwart an imminent terrorist attack or catch a dangerous criminal who is likely to flee).

II

This analysis of Fourth Amendment doctrine demonstrates that the government may conduct searches to obtain foreign intelligence that do not meet the same standards that apply in the normal law enforcement context. It is important to understand the current shape of Fourth Amendment law, and how it would apply to the circumstances at hand, in order to evaluate the constitutionality of the proposed amendment to FISA.

As we have noted earlier, the Fourth Amendment's reasonableness test for searches generally calls fox a balancing of the government's interest against the individual's Fourth Amendment interests. Here, the nature of the government interest is great. In the counterintelligence field, the government is engaging in electronic surveillance in order to prevent foreign powers or their agents from obtaining information or conducting operations that would directly harm the security of the United States.

To be sure, the Supreme Court has subjected counterintelligence searches of purely domestic terrorist groups to a warrant requirement. When it first applied the Fourth Amendment to electronic surveillance, the Supreme Court specifically refused to extend its analysis to include domestic searches that were conducted for national security purposes. *Katz* v. *United States*, 389 U.S. 347, 358 n. 23 (1967); *see also Mitchell* v. *Forsyth*, 472 U.S. 511, 531 (1985). Later, however, in *United States* v. *United States District Court, for the Eastern District of Michigan*, 407 U.S. 297, 299 (1972) ("Keith"), the Court held that the warrant requirement should apply to cases of terrorism by purely domestic groups. In doing so, the Justices framed the question by explaining that, "[i]ts resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion." *Id.* While acknowledging that "unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered," *id.* at 312, the Court cautioned that "[t)he danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.' Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* at 314. As a result, the Court held that the absence of neutral and disinterested magistrates governing the reasonableness of the search impermissibly left "those charged with [the] investigation and prosecutorial duty [as] the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *Id.* at 317.

The Court explicitly noted, however, that it was not considering the scope of the President's surveillance power with respect to the activities of foreign powers within or without the country. *Id.* at 308. After Keith, lower courts have recognized that when the government conducts a search for national security reasons of a foreign power or its agents, it need not meet the same requirements that would normally apply in the context of a search of United States citizens who are not foreign agents or for criminal law enforcement purposes. In *United States* v. *Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), for example, the Fourth Circuit observed that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, 'unduly frustrate,' the President in carrying out his foreign affairs responsibilities." *Id.* at 913. The Court based this determination on a number of factors, including:

> (1) "[a] warrant requirement would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations," *id.*;
>
> (2) "the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance . . . . Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate

> that the government in fact needs to recover that information from one particular source," *id.* at 91314: and
>
> (3) the executive branch "is also constitutionally designated as the pre-eminent authority in foreign affairs." *Id.* at 914.

The Court also recognized, however, that "because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount." *Id.* at 915. *See also United States* v. *Frown, 484 F.2d 418 (5*th Cir. 1973) , *cert. denied*, 915 U. S. 960 (1974): *United States* v. *Buck*, 548 F. 2d 871 (9th Cir.), cert. denied, 434 U.S. 890 (1977); *United States* v. *Clay, 430 F.2d 165 (5t" Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971).*

Therefore, the Fourth Circuit held that the government was relieved of the warrant requirement when (1) the object of the search or surveillance is a foreign power, its agent or collaborators since such cases are "most likely to call into play difficult and subtle judgments about foreign and military affairs," 629 F.Zd at 915 and (2) "when the surveillance is conducted 'primarily' for foreign intelligence reasons . . . . because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.". *Id*.

As the attacks on September 11, 2001 revealed, the government interest in conducting searches related to fighting terrorism is perhaps of the highest order—the need to defend the nation from direct attack. As the Supreme Court has said, ''"It is "obvious and unarguable' that no governmental interest is more compelling than the security of the nation." *Haig* v. *Agee*, 453 U.S. 280, 307 (1981) . The compelling nature of the government's interest here may be understood in light of the Founders' express intention to create a federal government "cloathed with all the powers requisite to the complete execution of its trust." the Federalist No. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed. 1961). Foremost among the objectives committed to that trust by the Constitution is the security of the nation. As Hamilton explained in arguing for the Constitution's adoption, because "the circumstances which may affect the public safety" are not "reducible within certain determinate limits,"

> it must be admitted, as a necessary consequence, that there can be no limitation of that authority, which is to provide for the defence and protection of the community, in any matter essential to its efficacy.

Id. at 147–48.[1] Within the limits that the Constitution itself imposes, the scope and distribution of the powers to protect national security must be construed to authorize the most efficacious defense of the nation and its interests in accordance "with the realistic purposes of the entire instrument." *Lichter* v. *United States*, 334 U.S. 742, 782 (1948). Nor is the authority to protect national security limited to that necessary "to victories in the field." Application of Yamashita, 327 U.S. 1, 12 (1946). The authority over national security "carries with it the inherent power to guard against the immediate renewal of the conflict." *Id.*

The text, structure and history of the Constitution establish that the Founders entrusted the President with the primary responsibility, and therefore the power, to ensure the security of the United States in situations of grave and unforeseen emer-

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[1] See also The Federalist No. 34, at 211 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (Federal government is to possess "an indefinite power of providing for emergencies as they might arise"); The Federalist No. 41, at 269 (James Madison) ("Security against foreign danger is one of the primitive objects of civil society. . .The powers requisite for attaining it, must be effectually confided to the federal councils.") Many Supreme Court opinions echo Hamilton's argument that the Constitution presupposes the indefinite and unpredictable nature of "the circumstances which may affect the public safety," and that the federal government's powers are correspondingly broad. See, e. g., *Dames & Moore* v. Regan, 453 U.S. 654, 662 (1981) (noting that the President "exercis[es] the executive authority in a world that presents each day some new challenge with which he must deal"); *Hamilton* v. *Regents*, 293 U.S. 245, 264 (1934) (Federal government's war powers are "well-nigh limitless" in extent); *Stewart* v. *Kahn*, 78 U.S. (11Wa11.) 493, 506 (1870) ("The measures to be taken in carrying on war . . . are not defined [in the Constitution]. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."); *Miller* v. *United States*, 78 U.S. (11 Wall.) 268, 305 (1870) ("The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.").

gencies. Intelligence gathering is a necessary function that enables the President to carry out that authority. The Constitution, for example, vests in the President the power to deploy military force in the defense of United States by the Vesting Clause, U.S. Const. Art. II, § 1, cl. 1, and by the Commander in Chief Clause, *id.*, § 2, cl. 1.[2] Intelligence operations, such as electronic surveillance, often are necessary and proper for the effective deployment and execution of military force against terrorists. Further, the Constitution makes explicit the President's obligation to safeguard the nation's security by whatever lawful means are available by imposing on him the duty to "take Care that the Laws be faithfully executed." *Id.*, § 3. The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions often require the unity in purpose and energy in action that characterize the Presidency rather than Congress.[3]

Judicial decisions since the beginning of the Republic confirm the President's constitutional power and duty to repel military action against the United States and to take measures to prevent the recurrence of an attack. As Justice Joseph Story said long ago, "[i]t may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are now found in the text of the laws." The Apollon, 22 U.S. (9 Wheat.) 362, 366–67 (1824). The Constitution entrusts the "power [to) the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety." *Duncan* v. *Kahanamoku*, 327 U.S. 304, 335 (1946) (Stone, C. J., concurring). If the President is confronted with an unforeseen attack on the territory and people of the United States, or other immediate, dangerous threat to American interests and security, it is his constitutional responsibility to respond to that threat. *See, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."); Kahanamoku, 327 U.S. at 336 (Stone, C.J., concurring) ("Executive has broad discretion in determining when the public emergency is such as to give rise to the necessity" for emergency measures); *United States* v. *Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); see also 3 Story, Commentaries § 1485 ("[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

The Department believes that the President's constitutional responsibility to defend the Nation may justify reasonable, but warrantless, counter-intelligence searches. As the Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; this power, by implication, includes the authority to collect information necessary for its effective exercise.

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[2] *See Johnson* v. *Eisentrager*, 339 U.S. 763, 789 (1950) (President has authority to deploy United States armed forces "abroad or to any particular region"); *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual"); *Loving* v. *United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (The "inherent power" of the Commander in Chief "are clearly extensive."); *Maul* v. *United States*, 274 U.S. 501, 515–16 (1927) (Brandeis Holmes, JJ., concurring) (President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); *Commonwealth of Massachusetts* v. *Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (the President has "power as Commander-in-Chief to station forces abroad"); *Ex parte Vallandigham*, 28 F.Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); Authority to Use United States Military Forces in Somalia, 16 Op. O.Z.C. 6, 6 (1992) (Barr, A.G.).

[3] As Alexander Hamilton explained in The Federalist No. 74, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." The Federalist No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). And James Iredell (later an Associate Justice of the Supreme Court) argued in the North Carolina Ratifying Convention that "[f]rom the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person." Debate in the North Carolina Ratifying Convention, in Jonathan Elliott, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 107 (2d ed. Ayer Company, Publishers, Inc. 1987) (1888). See also 3 Joseph Story, Commentaries on the Constitution 1485, at 341 (1833) (in military matters, "[u]nity of plan, promptitude, activity, and decision, are indispensable to success: and these can scarcely exist, except when single magistrate is entrusted exclusively with the power").

This examination demonstrates that the current situation, in which Congress has recognized the President's authority to use force in response to a direct attack on the American homeland, has demonstrated the government's increased interest. The government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others. *See, e. g., Romero* v. *Board of County Commissioners*, 60 F.3d 702 (10th Cir. 1995), cert. denied 516 U.S. 1073 (1996); *O'Neal* v. *DeKalb County*, 850 F.2d 653 (11th Cir. 1988). Here, for Fourth Amendment purposes, the right to self-defense is not that of an individual, but that of the nation and of its citizens. Cf. In *re Neagle*, 135 U.S. 1 (1890) ; The Prize Cases, 67 U.S. (2 Black) 635 (1862). If the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches.

III

It is against this background that the change to FISA should be understood. Both the executive branch and the courts have recognized that national security searches against foreign powers and their agents need not comport with the same Fourth Amendment requirements that apply to domestic criminal investigations. FISA embodies the idea that, in this context, the Fourth Amendment applies differently than in the criminal context. Nonetheless, FISA itself is not required by the Constitution, nor is it necessarily the case that its current standards match exactly to Fourth Amendment standards. Rather, like the warrant process in the normal criminal context, FISA represents a statutory procedure that, if used, will create a presumption that the surveillance is reasonable under the Fourth Amendment. Thus, it is wholly appropriate to amend FISA to ensure that its provisions parallel the bounds of the Fourth Amendment's reasonableness test.

The national security and foreign intelligence elements of the search justify its exemption from the standard law enforcement warrant process. After the enactment of FISA, for example, courts have emphasized the distinction between searches conducted to collect foreign intelligence and those undertaken for pursuing criminal prosecutions. Although this may be due, in part, to a statutory construction of the FISA provisions, these courts' language may be seen as having broader application. As the Second Circuit has emphasized, although courts, even prior to the enactment of FISA, concluded that the collection of foreign intelligence information constituted an exception to the warrant requirement, "the governmental interests presented in national security investigations differ substantially from those presented in traditional criminal prosecutions." *United States* v. *Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). The Duggan Court held that FISA did not violate the Fourth Amendment because the requirements of FISA "provide an appropriate balance between the individual's interest in privacy and the government's need to obtain foreign intelligence information." *Id.* at 74. The Court's holding was made in the context of acknowledging the reasonableness of "the adoption of prerequisites to surveillance that are less stringent than those precedent to the issuance of a warrant for a criminal investigation." *Id.* at 73.

Similarly, the Ninth Circuit found that the lowered probable cause showing required by FISA is reasonable because, although the application need not state that the surveillance is likely to uncover evidence of a crime, "the purpose of their surveillance is not to ferret out criminal activity but rather gather intelligence, [and therefore] such a requirement would be illogical." *United States* v. *Cavanagh*, 807 F.2d 787, 790–91 (9th Cir. 1987) (Kennedy, J.).[4] And consistent with both the language of the second and Ninth Circuits, the First Circuit, in upholding the constitutionality of FISA, explained that "[a]lthough evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance [and therefore] [t]he act is not to be used as an end-run around the Fourth Amendment's prohibition of warrantless searches." *United States* v. *Johnson, 952 F.2d 656, 5%72 (1*tht Cir. 1992) (citations omitted), cert. denied, 506 U.S. 816 (1992).

On the other hand, it is also clear that while FISA states that "the" purpose of a search is for foreign surveillance, that need not be the only purpose. Rather, law enforcement considerations can be taken into account, so long as the: surveillance also has a legitimate foreign intelligence purpose. FISA itself makes provision for

[4]The Ninth Circuit has reserved the question of whether the "primary purpose" test is too strict. *United States* v. *Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988)

the use in criminal trials of evidence obtained as a result of FISA searches, such as rules for the handling of evidence obtained through FISA searches, 50 U.S.C. § 1801(h) & 1806, and procedures for deciding suppression motions, *id.* § 1806(e). In approving FISA, the Senate Select Committee on Intelligence observed: "U.S. persons may be authorized targets, and the surveillance is part of an investigative process often designed to protect against the commission of serious crimes such as espionage, sabotage, assassinations, kidnapping, and terrorist; acts committed by or on behalf of foreign powers. Intelligence and criminal law enforcement tend to merge in this area." S. Rep. No. 95–701, at 10–11 (1978). The Committee also recognized that "foreign counterintelligence surveillance frequently seeks information in needed to detect or anticipate the commission of crime's," and that "surveillance conducting under [FISA] need not stop once conclusive evidence of a crime is obtained, but instead may be extended longer where protective measures other than arrest and prosecution are more appropriate." *Id.* at 11.

The courts agree that the gathering of counter-intelligence need not be the only purpose of a constitutional FISA search. An "otherwise valid FISA surveillance, is not tainted simply because the government can anticipate that the fruits of such surveillance may later be used, as allowed by § 1866(bj, as evidence in a criminal trial." *Duggan*, 743 F.2d at 78. This is due to the recognition that "in many cases the concerns of the government with respect to foreign intelligence will overlap those with respect to law enforcement." *Id.* In order to police the line between legitimate foreign intelligence searches and pure domestic law enforcement operations, most courts have adopted the test that the "primary purpose" of a FISA search is to gather foreign intelligence. See *id. United States* v. *Johnson, 952 F.2d 565, 572 (18*th Cir. 1991); *United States* v. *Pelton, 835 F.2d 1067 (4*th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States* v. *Badia, 827 F2d 1458, 1464 (11*th Cir. 1987), cert. denied, 485 U.S. 937 (1988).: Not All courts, however, have felt compelled to adopt the primary purpose test. The Ninth Circuit has explicitly reserved the question whether the "primary purpose" is too strict and the appropriate test is simply whether there was a legitimate foreign intelligence purpose. *United States* v. *Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988). No other Circuit has held that such a formulation would be unconstitutional.

In light of this case law and FISA's statutory structure, we do not believe that an amendment of F18A from "the" purpose to "a singificant" purpose would be unconstitutional. So long as the government has a legitimate objective in obtaining foreign intelligence information, it should not matter whether it also has a collateral interest in obtaining information for a criminal prosecution. As courts have observed, the criminal law interests of the government do not taint a FISA search when its foreign intelligence objective is primary. This implies that a FISA search should not be invalid when the interest in criminal prosecution is significant, but there is still a legitimate foreign intelligence purpose for the search. This concept flows from the courts' recognition that the concerns of government with respect to foreign policy will often overlap with those of law enforcement.

Further, there are other reasons that justify the constitutionality of the proposed change to FISA. First, as an initial matter, the alteration in the statute could not be facially unconstitutional. As the Court has held, in order to succeed a facial challenge to a statute must show that the law is invalid "in every circumstance." *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 699 (1995). As the Court made clear in *United States* v. *Salerno*, 481 U.S. 739 (1987), "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *Id.* at 745. Such a challenge would fail here. Even if FISA were amended to require that "a" purpose for the search be the collection of foreign intelligence, that class of searches would continue to include both searches in which foreign intelligence is the only purpose and searches in which it is the primary purpose—both permissible under current case law. A fortiori, if amending FISA to "a" purpose would be constitutional, then changing the language to "a significant" purpose—a somewhat higher standard—would meet Fourth Amendment requirements as well.

Second, amending FISA would merely have the effect of changing the statute to more closely track the Constitution. Courts have recognized that the executive branch has the authority to conduct warrantless searches for foreign intelligence purposes, so long as they are reasonable under the Fourth Amendment. Although the few courts that have addressed the issue have followed a primary purpose test, it is not clear that the Constitution, FISA, or Supreme Court case law requires that test. We believe that the primary purpose test is more demanding than that called for by the Fourth Amendment's reasonableness requirement. Adopting the proposed FISA amendment will continue to make clear that the government must have a legitimate foreign surveillance purpose in order to conduct a FISA search. It would

also recognize that because the executive can more fully assess the requirements of national security than can the courts, and because the President has a coristitutional duty to protect the national security, the courts should not deny him the authority to conduct intelligence searches even when the national security purpose is secondary to criminal prosecution.

The FISA amendment would not permit unconstitutional searches. A FISA court still remains an Article III court. As such, it still has an obligation to reject FISA applications that do not truly qualify for the relaxed constitutional standards applicable to national security searches. Rejecting an individual application, however, would not amount to a declaration that the "a significant" purpose standard was unconstitutional. Rather, the Court would only be interpreting the new standard so as not to violate the Constitution, in accordance with the canon of statutory construction that courts should read statutes to avoid constitutional difficulties. *See Public Citizen* v. *Department of Justice*, 491 U.S. 440, 466 (1989); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988). Amending FISA to, require only "a" purpose merely removes any difference between the statutory standard or reviewing FISA applications and the constitutional standard for national security searches.

Third, it is not unconstitutional to establish a standard for FISA applications that may be less demanding than the current standard, because it seems clear that the balance of Fourth Amendment considerations has shifted in the wake of the September 11 attacks. As discussed earlier in this memo, the reasonableness of a search under the Fourth Amendment depends on the balance between the government's interests and the privacy rights of the individuals involved. As a result of the direct terrorist attacks upon the continental United States, the government's interest has reached perhaps its most compelling level, that defending the Nation from assault. This shift upward in governmental interest has the effect of expanding the class of reasonable searches under the Fourth Amendment. Correspondingly, changing the FISA standard to "a significant" purpose will allow FISA warrants to issue in that class of searches. A lower standard also recognizes that, as national security concerns in the wake of the September 11 attacks have dramatically increased, the constitutional powers of the executive branch have expanded, while judicial competence has correspondingly receded. Amending FISA only recognizes that the Fourth Amendment analysis has changed in light of the more compelling nature of the government's interests given the altered national security environment.

Fourth, amending FISA in this manner would be consistent with the Fourth Amendment because it only adapts the statutory structure to a new type of counterintelligence. FISA was enacted at a time when there was a clear distinction between foreign intelligence threats, which would be governed by more flexible standards, and domestic law enforcement, which was subject to the Fourth Amendment's requirement of probable cause. Even at the time of the act's passage in 1978, however, there was a growing realization that "intelligence and criminal law enforcement tend to merge in [the] area" of foreign counterintelligence and counter terrorism. S. Rep. No. 95–701, at 11. September 11's events demonstrate that the fine distinction between foreign intelligence gathering and domestic law enforcement has broken down. Terrorists, supported by foreign powers or interests, had lived in the United States for substantial periods of time received training within the country, and killed thousands of civilians by hijacking civilian airliners. The attack, while supported from abroad, was carried out from within the United States itself and violated numerous domestic criminal laws. Thus, the nature of the national security threat, while still involving foreign control and requiring foreign counterintelligence, also has a significant domestic component, which may involve domestic law enforcement. Fourth Amendment doctrine, based as it is ultimately upon reasonableness, will have to take into account that national security threats in future cannot be so easily cordoned off from domestic criminal investigation. As a result, it is likely that courts will allow for more mixture between foreign intelligence gathering and domestic criminal investigation, at least in the counter-terrorism context. Changing the FISA standard from "the" purpose to "a significant" purpose would be consistent with this likely development.

For the foregoing reasons, we believe that changing FISA's requirement that "the" purpose of a FISA search be to collect foreign intelligence to "a significant" purpose will not violate the Constitution. We hope that making the Committee aware of the Department's views is helpful to its deliberation. Please do not hesitate to contact my office if we may be of further assistance. The Office of Management and Budget

has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

DANIEL J. BRYANT
Assistant Attorney General

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